RERMV TASK FORCE MEETING

June 30, 1986

Present: Msgr. William Barry, Bishop Will Herzfeld, Judge Alice Lytle, Diane Yu; Fred Persily, Trish Donahue, Kirk Wallace - Human Rights Resource Center; Marty Mercado, Tim Muscat

Status Report

SB 1961 (Ralph Act amendments) enrolled on 6/19/86 - awaiting Governor's signature.

SB 2080 - Senator Watson's staff has indicated she will introduce legislation in fall to mandate statewide reporting.

Civil Rights Act with criminal penalties - Civil Rights Enforcement Section is developing legislative proposal per AG's request.

Re other commission recommendations requiring legislation, the Task Force agreed that the next priority would be establishment of human rights centers. Need to develop full concept papers on this and other legislative proposals for AG's consideration. Staff to begin work on this with input from members and Persily, et al.

Meeting with Bill Honig

Superintendent Bill Honig has responded to the AG's letter transmitting Commission's report, indicating his willingness to meet with Msgr. Barry and other members.

Commissioners agreed that the recommendations dealing with education/schools should be first priority since development of the human resources centers and education programs go hand in hand.

Members agreed that Msgr. Barry and the Task Force members should meet with Honig at the earliest possible date. Yu suggested the meeting should concentrate on implementation of the Commission's recommendations and that a progress meeting be requested six months later to evaluate implementation efforts. Lytle added that the first meeting should be kept on a general level, discussing what the Department of Eduation can do overall instead of discussing specific issues, since Honig will most likely delegate work in this area to his staff.

It was agreed that an agenda for the meeting with Honig be developedd including the following:

1. Agreement on some kind of formal liaison with DOE/Honig - should be someone high enough on policy staff

2. Agreement to follow-up meeting six months from now

3. Reporting of crimes in schools to include RERMV

It was agreed that we should be prepared to discuss exactly what the Department of Education can do to implement the Commission's recommendations.

It was pointed out that Honig has a Commission on the Holocaust to develop recommendations for human rights. Task Force members agreed that we should try to get a commitment from Honig to give Commission recommendations same kind of priority, and that perhaps the Task Force members could serve as an advisory body to that Commission.

Commissioner Lytle volunteered to work with staff to develop a response and agenda for the meeting with Honig.

Administrative Actions

The members agreed that a meeting should also be set up with Attorney General Van de Kamp to discuss administrative actions to implement the recommendations, preferably before the meeting with Bill Honig. Staff to arrange for meeting.

Commissioner Lytle suggested that there should be some way that we could utilize the experience and expertise of law enforcement officers, such as Lt. Venegas from Fresno, et al, who were so helpful to Commission. Staff suggested that as a beginning perhaps they could be brought in as part of the Schools/Law Enforcement Cadre, and will follow-up with the DOJ Crime Prevention Office on this suggestion.

State of California

Department of Justice

Memorandum

F Research Redlow Litigation

To : Marty Mercado
Executive Director
RERMV Commission
Sacramento

Date : September 5, 1984

File No.:

Telephone: ATSS ( ) 454-5264
( ) 324-5264

From : Office of the Attorney General—Sacramento

Subject : Civil Code Section 52(c)

You have asked whether there are substantial definitions of the terms "reasonable cause" and "pattern or practice" as they are utilized in Civil Code section 52(c). There are no California cases interpreting these phrases as set forth in section 52(c). However, 42 U.S.C. section 3613 contains similar language:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter."

It must be remembered that this provision applies solely to housing discrimination cases covered by Title VIII of the 1968 Civil Rights Act. However, the similarity in language and between the enforcement aspects of the two provisions make it possible to apply the federal case law to the California statute in a convincing manner.

The exact meaning of "reasonable cause" in this context is not susceptible to precise definition. Rather, it was intended to accord the Attorney General a "wide discretion to determine when an issue of public importance justifying his intervention" arises. (U.S. v. Bob Lawrence Realty (5th Cir. 1973) 474 F.2d 115, 125 at fn. 14, cert den. 414 U.S. 826, reh. den. 414 U.S. 1087.) Under federal law, any determination of reasonable cause is not reviewable by a court. (U.S. v. Chickasaw Housing Authority (SD Ala. 1980) 504 FS 716, 726.) The best definition of "reasonable cause" in this context would seem to be a belief based upon a principled consideration of the facts and evaluation of the public interest within the context of the Attorney General's constitutional duties.

The definition of "pattern or practice" is much clearer. A pattern or practice is more than a single instance of conduct. (U.S. v. Hunter (4th Cir. 1972) 459 F.2d 205, 217.) It is more than "an isolated, accidental or peculiar departure from a non-discriminatory norm." (U.S. v. Chickasaw Housing Authority at 727.) The phrase seems to imply the common notion of repeated intentional behavior over a period of time. However, the existence of such a pattern or practice need not be established with "the specificity and exactitude of a blueprint." (U.S. v. Northside Realty Associates (5th Cir. 1973) 474 F.2d 1164, 1171.)

JAMES CHING
Deputy Attorney General

JC:etg

Excerpts From

PUBLIC HEARING

STATE OF CALIFORNIA

GOVERNOR'S TASK FORCE ON CIVIL RIGHTS

PUBLIC HEARING ON RACIAL, ETHNIC AND RELIGIOUS

VIOLENCE IN CALIFORNIA

STATE OFFICE BUILDING

107 SOUTH BROADWAY

AUDITORIUM

LOS ANGELES, CALIFORNIA

WEDNESDAY, JANUARY 13, 1982

1:00 P.M.

KAE GERNANDT, C.S.R.
License No. 5342

PETERS SHORTHAND REPORTING CORPORATION
7700 COLLEGE TOWN DRIVE, SUITE 209
SACRAMENTO, CALIFORNIA 95826
TELEPHONE (916) 383-3601

neglected to ask the previous speaker.

Do you have something set up in the synagogue structure or educational structure to measure the impact on the children, the psychological damage and to sort of track that for awhile? Have you got some models you can put before us?

RABBI FRONT: No, ma'am, we do not. Our approach is to try to teach through positive, constructive education the beauty of our faith and heritage and traditions in the hopes that the individual will be strong and unafraid that walking through any valleys they may not fear that evil, that we feel otherwise we're merely wasting our time and being counter-productive.

CHAIRPERSON LYTLE: Are there any other questions from panel members?

(No response.)

CHAIRPERSON LYTLE: Rabbi, thank you very much.

RABBI FRONT: Thank you.

CHAIRPERSON LYTLE: The next witness is Professor Charles Firestone.

MR. FIRESTONE: Thank you, Madam Chairman and members of the Task Force. I will be very brief and I hope not too repetitive of other testimony that has gone before.

Really, what I have come to address is the question of media and media depictions, and even more directly,

possible solutions and possible remedies. And I just came to talk to you very briefly about some of those possibilities.

Obviously, the broadcast media is very pervasive, tremendously influential, as I don't have to really explain. Some surveys suggest that television is the second-most influential institution in the United States, second only to the White House.

But as we see all these things happen and as people have very ably depicted what has been happening in the United States recently, and you see it on television, and you hear it on the radio, various hate statements.

The question is what can we do about it on broadcasting. The first inclination is, well, let's stop it. Of course, there is the First Amendment with the desire to censor, which is of course barred by the First Amendment, and also Section 326 of the Communications Act. We can't have prior restraint, and we are not to have content-related regulation where possible.

There is regulation allowable where it's time, place and manner type regulation, but in the area of violence and advocacy, the standard is that the statement be intended to promote imminent lawless action and that there's a likelihood to bring it about, which is a very strict standard and a very strong standard against curbing that kind of speech.

But we do have a regulated broadcasting community in the United States through the Federal Communications Commission licensing scheme, where we have a few trustees for the public who are licensed in that trust.

There is license renewal action. A lot of times in the past, there have been efforts in the licensing process to get broadcasters to be more responsive to community problems, to be more responsive in terms of equal employment opportunities and now, most recently, a push to have more structural regulations and programming regulations which would be aimed at greater ownership opportunities on the part of minorities and those who have been traditionally under-represented.

There is the one area in this area of regulations that does go to programming, and that's something that's called the Fairness Program, which provides that controversial issues of importance should be aired over the broadcast stations, and once one side of a controversial issue of public importance is addressed that the broadcaster must provide reasonable opportunity for the presentation of contrasting viewpoints. The idea there is that rather than censor it is that more speech will create a marketplace of ideas where truth will always prevail that we'll be better citizens and self-governing ourselves if we have access to a greater number of viewpoints.

I think that in this area that the Fairness Doctrine is extremely important and one that is a remedy that is available to those who feel that the media is one-sided or only putting on one side of these particular issues. Unfortunately, the present Federal Communications Commission has proposed repeal of this law, Section 315 of the Communications Act, which not only provides for the Fairness Doctrine but also for equal opportunity for candidates for elected offices. Indeed, the Chairman of the Federal Communications Commission will be addressing, I think it's Hollywood Radio or the Academy of Television Arts and Sciences on Friday in Century City and probably will be suggesting that broadcasters should be given full First Amendment rights. Of course, they have full First Amendment rights, but First Amendment rights that are equated to those of newspapers, suggesting that there's more broadcast stations than the newspapers.

I would urge this body in your ultimate report and also in any other way you can to urge the retention of the Fairness Doctrine. I think that the arguments for its repeal are flawed, that there is a scarcity of opportunity to broadcast over our public airways, and that this issue really, I think, shows one of the strong reasons why we do need a Fairness Doctrine, that all sides have opportunity to address the American public over the public airways.

There are some other remedies that you should consider and perhaps not quite as inhibitory or regulatory as the Fairness Doctrine, and that is to promote programs and public service announcements, free speech messages, TV, radio, local origination on cable that address these problems, and even commercial messages. I notice that one of the witnesses just before me was suggesting that there are some public service announcements and messages, but I think it's a real problem because on the one hand you don't want to encourage people to even be thinking about it from the point of view of getting more publicity and therefore getting people to be thinking about going out and committing acts of violence against race, ethnic, religious bodies. On the other hand, our whole constitution of the First Amendment is prefaced on the idea that truth will prevail, that we're a tolerant nation, that if this issue is addressed in these kinds of announcements that the people would see the light.

So, I urge you to encourage these kinds of announcements, including the encouragement of the broadcasters to give free time to the presentation of these issues.

Finally, I'd like to commend this body for holding these hearings. Indeed, hearings such as these hearings raise the issue to the public agenda and gets coverage in itself. Unfortunately, I don't see too much broadcast

coverage, but I did see some of the newspapers.

So, in summary, I urge you to promote the protection of the Fairness Doctrine, Section 315. I think that encouraging the retention of that equal employment opportunity standards and promotion of minority ownership goals at the federal and, of course, local level in the area of cable, is very important because as people are employees and owners of the media, they're going to be more likely to have the tolerant message go forth and promote understanding through access by the public to different viewpoints and access by members of the public to disseminate their views over the electronic media.

Thank you.

CHAIRPERSON LYTLE: Professor Firestone, we have received in our previous hearings from private citizens and from a professor of journalism at UC Berkeley, testimony indicating that the press or the journalistic industry contributes in some manner through the existence of racial tension through the perpetuation of negative images of groups through the failure to portray certain groups as ordinary, normal people going about their business, and through an excessive concentration on the commission of crimes by certain groups. Would you be willing to comment on that?

MR. FIRESTONE: Well, first of all, I think from my own personal experience, yes, I think that that is

probably true. I don't have studies that I have done. Although, I would point out the study done by the United States Commission on Civil Rights called Windowdressing on the Set, and they did first a study and then an update which documented, I think, both the stereotyping and other representations of minority groups in the broadcast media, particularly television.

In part what occasioned my coming and addressing this issue of the remedies because while it's an excellent study, once the original study was reported, they suggested that the Federal Communications Commission get involved in the programming regulations. I think the media, at least the executives, seized upon that and started saying that they were promoting that they wanted to censor.

And I think that diverted the thrust of the study and of the findings. So, that's why I came, in a way, to urge you to promote the positive depiction of these images rather than being too focused on the negative and trying to cut down on the negative. So, that's my comment on that.

CHAIRPERSON LYTLE: Are there any other questions?

Ms. Mercer.

MS. MERCER: Professor Firestone, do you have any feeling with the FCC regulations going down, do you feel that the political climate now is such that this is a major threat?

MR. FIRESTONE: Well, I really didn't think so when it was first proposed, and I still tend to think that at least in my own assessment of the political situation is that it's very unlikely, particularly in the House of Representatives. Actually, it's amazing that I think the Senate is probably more inclined to do it.

You just never know, and I think that it's an issue that people are not that aware of, and it's one that I think is extremely important. So, it's very important that we be heard and that bodies such as yours speak out on this issue. You just can't sit back and let it happen and then try to correct it afterwards.

MS. MERCER: Are you and your colleagues involved in educating the public and also attempting to do what you're encouraging us to do as well?

MR. FIRESTONE: We try. That's why I'm here. And there is an organization called Friends of the Fairness Doctrine.

CHAIRPERSON LYTLE: Before you leave, there's another question.

MS. CANSON: Can you describe or list for us groups -- you just did it as you were about to turn away and listed one group -- other groups, Professor Firestone, that know about that, are engaged in this. I'm sort of interested in --

MR. FIRESTONE: Well, there is Friends of the Fairness Doctrine. This was formed just last year, and it involves representatives of labor, of various religious organizations, particularly the United Church of Christ, which is very active in this area. The National Citizens Committee for Broadcasting. Just offhand, I'm just trying to think. United Auto Workers, I think, are strongly involved, but the National Education Association, those are some organizations just offhand that I can remember that have been quite active in it.

I would hope the NAACP will be all the moreso. I know that your Executive Director is very involved in the media, and they're getting in moreso.

MS. CANSON: I'll tell him.

CHAIRPERSON LYTLE: Monsignor.

MONSIGNOR FLYNN: Professor, you touched on this, but I'm not sure if I understood what you viewed. It has struck me in these last two days that one of the problems is a lot of our citizenship does not really understand the depth of this problem, and I've been struggling a little. Is the press not reporting enough? Is the press reporting too much?

I was kind of shocked that I read in some of the testimony that the destruction at Robert Appling's home, it was three weeks before that appeared in the paper, and it

only appeared in one Los Angeles paper.

Do you have a view as to whether we should be urging the press to report more of what's going on in terms of anti-Semitic acts, anti-Black acts, Klan activities, or does that foment them?

MR. FIRESTONE: It's really perplexing. I don't know. You would hope that the greater reportage of these events would create a backlash, a reaction against it and a greater awareness of the problems.

That's sort of my faith also in the First Amendment, that's the underlying values of the First Amendment that the more we hear about these things the better society will be. I mean, it's really the basis of our democracy.

So, I really kind of come out in favor of letting the facts come out and being adequately reported and also the response. It does remind me of one other item, though, which is that after there was a Fairness Doctrine ruling back in the late 1960's that said that the broadcast of cigarette commercials raised one side of the issue that whether or not smoking was desirable, and therefore, the broadcasters had to put on anti-cigarette smoking announcements in much less percentage than the number of commercials. But once those announcements came on, those anti-smoking announcements, I can't really remember how effective they were, but cigarette consumption went down, particularly among

the young.

Then there was a law that banned cigarette commercials completely from the broadcast airways, and it was in part in conjunction with the tobacco industry, and they basically agreed to do this, which took off the anti-cigarette advertisements as well, and cigarette consumption went back up.

So, at least it seemed to me that the anti-cigarette messages were very effective, and presumably whether the reports of the violent acts are effective in preventing those things, at least perhaps the messages that effectively portrayed it. I'm not a producer. One could really think of exactly how the message would go, but a very effective message that showed people how terrible it was to do this would be something that would maybe cut down on the incidents.

CHAIRPERSON LYTLE: Thank you, Professor Firestone.

MR. FIRESTONE: Thank you very much.

CHAIRPERSON LYTLE: The next witness is Rebecca Esparza.

MS. ESPARZA: Good evening. My name is --

CHAIRPERSON LYTLE: Miss Esparza, I'm sorry about that microphone. It really doesn't seem to be very powerful. You're going to have to speak up.

MS. ESPARZA: I live at 11821 Santa Maria Street

Report on Subcommittee on Litigation

September 10, 1984

Purpose:

The subcommittee is to develop strategies to assist the Attorney General in exercising his enforcement authority under applicable statutes with particular emphasis in the Ralph Act.

Background:

At the first meeting of the RERMV Commission, the suggestion was made that the Attorney General explore the possibility of bringing a civil action under the Ralph Act. The Act provides that all citizens have the right to be free from violence, or intimidation by threat of violence because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute. Civil Code §51.7.

Subdivision (b) of the Act provides that whoever denies the right or aids, incites, or conspires in the denial of the 51.7 right is liable for actual damages and an additional $10,000 in punitive damages.

Subdivision (c) of the Act allows the Attorney General, the District Attorney, or the City Attorney to bring a civil action based on section 51.7 if there is reasonable cause to believe that persons are engaged in a pattern or practice of resistance to the full enjoyment of the rights embodied in the Act.

The first meeting of the subcommittee was confined to a discussion of possible strategies under the Ralph Act with subsequent meetings to be devoted to Attorney General general enforcement powers. The subcommittee first identified criteria the Attorney General could use in selecting cases for Ralph Act enforcement. Two considerations were paramount in identifying the criteria. They were the need to 1) utilize limited Attorney General resources in a manner designed to produce the most successful result; 2) avoid a perception on the part of local officials that the Attorney General is unilaterally interfering in essentially local matters.

Criteria:

The criteria identified by the subcommittee are the following:

(1) Multi-jurisdictional Acts constituting a pattern and practice that crosses county lines;

(2) Complexity of issues - Local officials may lack the resources to handle a factually or legally complicated matter.

(3) High degree of controversy - Serious political or other constraints may impair the ability of local officials to handle a particular set of circumstances;

(4) Egregiousness of the acts forming the basis of the suit. This criterion is further subdivided as follows:

a) great property or personal injury;
b) numerous victims;
c) series of acts of long duration;
d) serious threats of future violence.

(5) Case is of general "public interest" - This may include acts of violence against school children or acts of violence occurring in areas experiencing violence, in the recent part, e.g., Watts.

(6) Perpetrator of violence is a group as opposed to individuals.

As you can see, there is some degree of overlap in these criteria, but they are sufficiently distinguishable from one another to serve as convenient guidelines.

Recommendations:

The subcommittee felt that certain administrative and political steps should be taken by the Attorney General to ensure that the office is properly prepared to handle a new type of case. The recommendations are:

(1) An administrative procedure should be created within the Attorney General's office to provide for referral of matters coming to the office involving possible Ralph Act violations to the Civil Rights Division.

(2) At the same time these matters should be referred to BOICC for possible inclusion into its statistical network. There should also be developed a "feedback" mechanism from ~~BOICC~~ to the Civil Rights Division whenever the ~~BOICC~~ notes circumstances indicating a pattern and practice of violence. Sources for "pattern and practice" information could be 1) complaints coming into the Attorney General's office, 2) DFEH and FEPC files, 3) newspapers and TV news, 4) local law enforcement files; etc.;

(3) Screening procedures for the selection of Ralph Act cases should be developed for use at the initial intake stage and at the Civil Rights Division level;

(4) Intake personnel in Attorney General's office should be trained in the use of appropriate criteria for use in screening cases;

(5) Referral policy should be utilized at level of Civil Rights Division of cases that are unsuitable for Attorney General's Ralph Act enforcement but have potential for Ralph Act or regular P. C. enforcement at the local level;

(6) The Attorney General should set up training in Ralph Act enforcement for local District Attorneys, City Attorneys and law enforcement using P.O.S.T. and other mechanisms. In this regard, the Attorney General should explore the possible use of the California Specialized Training Institute (CSTI) as an additional training vehicle for local law enforcement. Attached is a brochure detailing the CSTI program and curriculum.

(7) The Attorney General should take steps to heighten the sensitivity of local law enforcement to the importance of attaching more priority to Ralph Act type cases. One method of beginning this process would be through distribution of a letter expressing the Attorney General's new enforcement policy in this regard attached to a press release announcing the policy.

(8) The Attorney General should solicit the assistance of District Attorneys and City Attorneys early in the development of Ralph Act enforcement policy.

(9) The Attorney General should explore the feasibility of directly prosecuting under selected penal code provisions cases of racial violence unsuited for the Ralph Act or other civil enforcement. At later meetings of the subcommittee criteria will be refined for use in these types of enforcement actions.

(10) The Attorney General should explore possibility of Ralph Act enforcement against local law enforcement in appropriate cases. Such cases would, of necessity, require a showing of a "pattern and practice" within a police or sheriff agency. Moreover, given the importance of honest, unbiased police enforcement to the safety and well-being of the community such an action would certainly be within the public interest.

(11) The Attorney General should explore intervention into Ralph Act cases brought by District Attorneys, City Attorneys or private individuals. The subcommittee will work on criteria for these cases. The letters mentioned earlier should include notification of this aspect of the Attorney General's enforcement policy.

It should be noted that one recommendation coming out of the subcommittee meeting dealt with an issue within the purview of the Legislative subcommittee. With apologies for "turf invasion" the Litigation Subcommittee submits the following recommendation. The Attorney General should be given express statutory authority to train police, District Attorneys and City Attorneys in the area of racial, ethnic, religious and minority violence.

ATTORNEY GENERAL'S COMMISSION ON RACIAL, ETHNIC, RELIGIOUS AND MINORITY VIOLENCE
REPORT OF LITIGATION SUBCOMMITTEE MEETING
September 10, 1984

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JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

350 McALLISTER STREET, ROOM 6000
SAN FRANCISCO 94102
(415) 557-2544

November 7, 1984

(415) 557-3991

Honorable Alice Lytle
Municipal Court - Dept. G
720 Ninth Street
Sacramento, CA 95814

Re: Ralph Act

Dear Alice:

Enclosed, as you requested, are copies of the two Ralph Act accusations issued by DFEH recently. I will keep you informed as to the progress of these cases.

Also, I understand from Ann Noel, FEHC counsel, that at the FEHC meeting in San Diego on November 8, 1984, the Commission will hear further testimony regarding racial violence in San Diego County. She expects that additional Ralph Act violations may be revealed during that testimony. Deputy Attorney General Louis Verdugo will be present for that testimony, and can report to the RERMV Commission at your December meeting, if you wish.

Sincerely,

JOHN K. VAN DE KAMP
Attorney General

Marian

MARIAN M. JOHNSTON
Deputy Attorney General

MMJ:dw
encl.
cc: Marty Mercado
Manny Medeiros
Louis Verdugo

JOHN R. CASTELLO, Chief Counsel
ANNE D. BRANDON, Directing Attorney
VALERIE D. TOOHEY, Staff Attorney
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
30 Van Ness Avenue, Third Floor
San Francisco, California 94102
Telephone No. (415) 557-1401

Attorneys for the Department

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, vs. UNIVERSE PAINT COMPANY, JEFF LEATHERMAN, and HAP LEATHERMAN, Respondents.	Case No. FEP 83-84 E1-0143se ACCUSATION
THOMAS GLENN ACKERMAN, Complainant.	

MARK GUERRA, in his official capacity as the Director of the Department of Fair Employment and Housing, issues the following Accusation in the name of the Department of Fair Employment and Housing against the Respondents named above:

PRELIMINARY STATEMENT

By this Accusation, the Department of Fair Employment and Housing, California's civil rights enforcement agency, charges Universe Paint Company and Jeff Leatherman, vice-president and plant supervisor, with employment discrimination

and with violence and intimidation by threat of violence against Thomas Glenn Ackerman, on the basis of his sex and presumed race. Respondent Jeff Leatherman continuously subjected Thomas Glenn Ackerman to physical, verbal and visual sexual and racial harassment, as well as acts of violence and intimidation by threat of violence because of his sex and race. This conduct created working conditions which were so intolerable that Thomas Glenn Ackerman was forced to leave Respondents' employ. The Department seeks a finding that Respondents have violated Government Code sections 12940(a) and (i) of the California Fair Employment and Housing Act and Civil Code section 51.7 as it is incorporated by Government Code section 12948 of the Fair Employment and Housing Act. Pursuant to that finding, the Department also seeks an award of compensatory damages, including back pay and costs associated with this action, an award of punitive damages, reinstatement of the Complainant, an order requiring Respondents to post a notice stating that Respondents have violated the Fair Employment and Housing Act, and an order requiring Respondents to develop, implement and post a policy against discrimination, violence, threats of violence, and harassment.

JURISDICTION

1. The Department of Fair Employment and Housing (Department) is an administrative agency empowered to issue Accusations under section 12965 of the Fair Employment and Housing Act (the Act), California Government Code sections 12900 et seq.

2. Jeff Leatherman, individually, Hap Leatherman, individually, and Universe Paint Company (Respondents) are employers within the meaning of Government Code section 12926(c).

3. Thomas Glenn Ackerman (Complainant) is a Caucasian male with some features resembling those of a Black male. He was employed by Respondents as a clerk and was an employee within the meaning of Government Code section 12926(b).

On October 19, 1983, Complainant filed a verified complaint in writing with the Department alleging that Respondents committed unlawful employment practices against Complainant in violation of the Fair Employment and Housing Act within the preceding one year.

STATEMENT OF VIOLATION

4. Beginning on or about August 2, 1983, until approximately September 19, 1983, Complainant's supervisor, Jeff Leatherman, repeatedly subjected Complainant to acts of verbal and visual harassment and discrimination on the basis of race or perceived race or sex. Such acts include, but are not limited to the following examples:

a) Respondent Jeff Leatherman repeatedly addressed Complainant by racially derogatory and demeaning terms such as "nigger," "one of the niggers," "Tommy Two-Tone half nigger, half Mexican," and "Kizee."

b) On numerous occasions, Respondent Jeff Leatherman remarked to Complainant, "You've got hair like a nigger."

c) On several occasions, Respondent Jeff

Leatherman referred to Complainant and other employees as "my niggers:"

d) On one occasion, Respondent Jeff Leatherman stated to Complainant, "I know you're part Black, but I don't know what the rest of you is."

e) On one occasion, Respondent Jeff Leatherman remarked to his father, Respondent Hap Leatherman, the owner of Respondent Universe Paint Company, that "I am keeping the niggers busy." Hap Leatherman laughed in response.

f) On several occasions, Respondent Jeff Leatherman sang racially derogatory songs to Complainant.

5. Beginning on or about August 2, 1983, until approximately September 19, 1983, Complainant's supervisor, Respondent Jeff Leatherman, repeatedly subjected Complainant to acts of violence or physical harassment and discrimination on the basis of sex or race while he was at work. Examples of such violence and harassment include, but are not limited to, the following incidents:

a) Respondent Jeff Leatherman repeatedly pinched Complainant on the buttocks;

b) On one occasion, Respondent Jeff Leatherman grabbed Complainant's chest area;

c) On numerous occasions, Respondent Jeff Leatherman grabbed or touched Complainant's buttocks;

d) On numerous occasions, Respondent Jeff Leatherman grabbed or touched Complainant on the neck;

e) On several occasions, Respondent Jeff

Leatherman pushed Complainant by the shoulders in a forward and downward motion and pressed himself against Complainant's buttocks, making humping or thrusting motions. During one of these incidents, as Respondent Jeff Leatherman was making thrusting motions against the Complainant's buttocks, he stated, "Oh Tommy lover, I'm going to stick every inch of my dick up your ass and make you moan and you are going to love every minute of it."

f) On at least three (3) occasions, Respondent Jeff Leatherman walked up to Complainant from behind, placed his hands between Complaint's legs, and poked and grabbed at his genitals and rectal area.

g) On one occasion, Respondent Jeff Leatherman approached Complainant from behind and grabbed Complainant's buttocks and genitals as Complainant was leaning into a vat to check an order. When Complainant turned to protest, a larger male employee, acting as a bodyguard to Leatherman, stepped toward Complainant in a threatening and menacing manner.

6. Beginning on or about August 2, 1983, until approximately September 19, 1983, Complainant's supervisor, Respondent Jeff Leatherman, repeatedly subjected Complainant to verbal harassment or intimidation by threat of violence or discrimination on the basis of sex or race. Examples of such verbal harassment and discrimination and intimidation by threat of violence include, but are not limited to, the following incidents:

a) Respondent Jeff Leatherman used obscenities

and told obscene jokes and sexual stories on a daily basis. When Complainant and other employees protested, they were told by Respondent Jeff Leatherman to "take a walk," or "I can do anything I want to do."

b) Respondent Jeff Leatherman repeatedly ordered his subordinates to address him as "Bwana Dick" or "Big Dick."

c) On one occasion, Respondent Jeff Leatherman suggested to Complainant that Complainant should move in with him;

d) On numerous occasions, Respondent Jeff Leatherman referred to Complainant as "sweetheart," "lover," and "sexy."

e) On several occasions, Respondent Jeff Leatherman stated to Complainant, "Hey Tommie, you're my bitch."

f) On several occasions, Respondent stated to Complainant, "you're a cute little fagot" and "Tommy, you have such cute kinky hair for a fagot."

g) On several occasions, Respondent Jeff Leatherman made references to Complainant's hair, comparing it to pubic hair;

h) On one occasion, Complainant repeatedly asked Respondent Jeff Leatherman when a paint order would be finished. Respondent Jeff Leatherman replied, approximately six times, "as soon as you suck my dick."

i) On one occasion, Respondent Jeff Leatherman remarked to several customers at the front desk that Complainant did not realize that the "group in the back are guys--he thinks

they are girls because he doesn't know the difference."

7. Beginning on or about August 2, 1983, until approximately September 19, 1983, Complainant's supervisor, Respondent Jeff Leatherman repeatedly subjected Complainant to acts of visual harassment and discrimination on the basis of sex or race, or intimidation by threat of violence. Examples of such visual harassment or intimidation by threat of violence include, but are not limited to, the following incidents:

a) On one occasion, Respondent Jeff Leatherman approached Complainant and exposed his genitals to Complainant;

b) On at least one occasion, Respondent Jeff Leatherman exposed his buttocks to Complainant;

8. After Complainant repeatedly refused Respondent Jeff Leatherman's advances, Respondent's harassment and abuse of Complainant increased. On several occasions, Respondent Jeff Leatherman sent Complainant to find orders in the store that did not exist. On at least two occasions, Respondent Jeff Leatherman advised other employees he was trying to make Complainant quit.

9. On or about Friday, September 16, 1983, Respondent Jeff Leatherman arranged a "belated birthday party" for the Complainant. Respondent Jeff Leatherman ordered the Complainant to come into the lockerroom where several male employees were waiting. When Complainant entered, the male employees blocked the door so that Complainant could not leave and Respondent Jeff Leatherman presented Complainant with a sexually abusive and racially derogatory "birthday card" and a "present". When Complainant unwrapped the "present", he found a dead rat.

Jeff Leatherman later confided to another employee that he had planned the incident to force Complainant to quit.

10. On or about Monday, September 19, 1983, a few days after the incident in the lockerroom, Complainant found the working conditions so intolerable he was forced to resign.

11. Complainant repeatedly rejected and refused Respondent Jeff Leatherman's advances.

12. Respondent Jeff Leatherman is a managing agent of Respondent Universe Paint Company.

13. Respondent Hap Leatherman, the owner of Respondent Universe Paint Company, was aware of and ratified the actions of his son, Respondent Jeff Leatherman.

14. Respondent Jeff Leatherman acted maliciously and oppressively in making these discriminatory and harassing comments, threats and physical assaults.

15. Respondent Jeff Leatherman has engaged in a pattern and practice of discrimination and harassment toward other employees on the bases of race or sex. Examples of such a pattern include, but are not limited to, the following:

a) Respondent Jeff Leatherman has touched, grabbed, rubbed and pinched other employees;

b) Respondent Jeff Leatherman has made racially or sexually derogatory comments to other employees;

c) Respondent Jeff Leatherman played sexually explicit movies in the workplace.

16. Respondents' actions, as described in this Accusation, constitute violations of section 12948 of the Fair

Employment and Housing Act, Government Code sections 12900 et seq.

17. The acts of violence and threats of violence perpetrated by Respondent Jeff Leatherman because of Complainant's sex or race or presumed race, as described above, constitute violations of Civil Code section 51.7.

18. Respondents' conduct, as described above in this Accusation, constitutes harassment and discrimination on the bases of race or sex, in violation of Government Code secions 12940(a) and 12940(i) of the Fair Employment and Housing Act.

STATEMENT OF DAMAGES

19. Respondent Jeff Leatherman made many of the comments, threats and physical assaults described above in the presence of other employees, thus causing Complainant to suffer public humiliation and extreme emotional distress.

20. As a result of Respondent Jeff Leatherman's unlawful conduct, comments, threats or acts of violence against Complainant because of his sex or presumed race, Complainant suffered personal humiliation and pain and suffering from emotional trauma. The emotional harm caused by Respondent's unlawful conduct has resulted in physical as well as emotional symptoms. Physical symptoms include, but are not limited to, nausea, loss of sleep and loss of appetite. Emotional symptoms of the harm caused by Respondents' unlawful conduct include, but are not limited to, loss of concentration, fear, loss of self-esteem and doubt concerning sexual identity.

21. As a result of Respondent's unlawful and egregious

conduct and the resulting emotional injury to Complainant, Complainant began drinking heavily.

22. As a further result of Respondent's unlawful conduct, Complainant lost a job he otherwise enjoyed, and was forced to relocate to Southern California and later, Texas from his home in Northern California because he feared reprisal from Respondents.

23. Respondents' unlawful employment practices were committed by Respondent Jeff Leatherman, a managing agent of Respondent Universe Paint Company, and were malicious, oppressive, and particularly egregious and inexcusable.

PRAYER FOR RELIEF

WHEREFORE, IT IS PRAYED that the Fair Employment and Housing Commission hold a hearing, find that Respondent has violated the Fair Employment and Housing Act, and order the Respondent to:

a) Cease and desist from discrimination against employees on the basis of sex and race;

b) Cease and desist from using violence and the threat of violence because of sex and race against Complainant and all other persons;

c) Post an order in an area accessible to all employees and customers stating that Respondents have violated the Fair Employment and Housing Act by racially or sexually harassing Complainant and by making threats of violence and by committing acts of violence and discrimination upon Complainant because of his sex or race;

d) Reinstate Complainant in his former position or other equivalent employment acceptable to Complainant;

e) Accord to Complainant, in such new employment, all seniority, benefits, rights and privileges that would have accrued had he not been constructively terminated by Respondent on or about September 21, 1983;

f) Pay to Complainant compensatory damages in the form of all back pay lost by Complainant between approximately September 21, 1983, and his reinstatement pursuant to paragraph (d) of this Prayer, or his refusal of such reinstatement, together with ten percent (10%) annual interest from the date such wages would have been earned;

f) Pay to Complainant compensatory damages in the form of special costs incurred by Complainant which he would not have incurred but for Respondents' unlawful conduct;

g) Pay to Complainant within 30 days of the Commission's order reasonable compensatory damages, plus ten percent (10%) annual interest from the date awarded, for the emotional distress, pain, suffering and humiliation undergone by Complainant as a result of Respondents' unlawful conduct;

h) Pay to Complainant reasonable exemplary damages, plus ten percent (10%) annual interest from the date awarded, to serve as an example and to deter Respondents from future acts of discrimination, violence, threats, and deprivation of rights of individuals based on their sex and race;

i) Pay to Complainant $10,000 in statutory damages for each of the nine (9) violations of the Fair Employment and

Housing Act as it incorporates Civil Code section 51.7 outlined in paragraphs 5 and 9, pages 4, 5 and 7, as provided by Civil Code section 52(b);

j) Develop and disseminate a written policy prohibiting discrimination, violence and threats of violence on the basis of sex and race;

k) Instruct Respondent Jeff Leatherman specifically concerning his obligation to avoid racially and sexually harassing employees and/or take appropriate disciplinary action against Jeff Leatherman; and

12. Such other and further relief as the Commission deems just and proper.

DATED: October 18, 1984

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

JOHN R. CASTELLO
Chief Counsel

By _____
VALERIE D. TOOHEY
Staff Attorney

Attorneys for the Department

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV 8-72)

JOHN R. CASTELLO, Chief Counsel
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San Francisco, California 94102
Telephone: (415) 557-1401

Attorneys for the Department

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF THE CALIFORNIA

In the Matter of the Accusation of THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, vs. UNIVERSE PAINT COMPANY, JEFF LEATHERMAN, and HAP LEATHERMAN, Respondent/s.	Case No. FEP 83-84 E1-0143se STATEMENT TO RESPONDENT
THOMAS GLENN ACKERMAN, Complainant/s.	

TO: UNIVERSE PAINT CO., JEFF LEATHERMAN and HAP LEATHERMAN

The Accusation that accompanies this Statement has been filed against you by the Department of Fair Employment and Housing and is hereby served on you.

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to the Fair Employment and Housing Commission within fifteen (15) days after the accusation was personally served on you or mailed to you, the Fair

Employment and Housing Commission may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled "Notice of Defense" or a notice of defense as provided by section 11506 of the Government Code to the Fair Employment and Housing Commission at:

Fair Employment and Housing Commission
1390 Market Street, Suite 410
San Francisco, CA 94102

You must also deliver or mail a copy of your notice of defense to the undersigned at:

Valerie D. Toohey, Staff Attorney
Department of Fair Employment and Housing
30 Van Ness Avenue, Third Floor
San Francisco, CA 94102

Failure to file a notice of defense will constitute a waiver of your right to a hearing. If you file a notice of defense within the time permitted, a hearing on the charges in the Accusation will be held before the Fair Employment and Housing Commission on Jan. 8 & Apr. 1-5, 1985 at the time and place indicated in the enclosed Notice of Hearing.

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within ten (10) working days after you discover the good cause. Failure to notify the agency within ten (10) days will deprive you of a postponement.

You may, but need not, be represented at any stage of these proceedings by an attorney or any other authorized

representative.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in section 11507.6 of the Government Code that are in the Department's possession, custody, or control, you may contact the undersigned.

DATED: October 18, 1984

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

JOHN R. CASTELLO
Chief Counsel

ANNE D. BRANDON
Directing Attorney

By Valerie D. Toohey
VALERIE D. TOOHEY
Staff Attorney

Attorneys for the Department

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, vs. UNIVERSE PAINT COMPANY, JEFF LEATHERMAN, and HAP LEATHERMAN, Respondents.	Case No. FEP 83-84 El-0143se
THOMAS GLENN ACKERMAN, Complainant.	NOTICE OF DEFENSE

I am a respondent in this matter. I acknowledge receipt of copies of the Complaint and Accusation, and of the Statement to Respondent, a blank Notice of Defense, and sections 11507.5 - 11507.7 of the Government Code.

I request a hearing of this matter before the Fair Employment and Housing Commission.

DATED:

_____
Respondent

_____
Address

_____
City State Zip

JOHN CASTELLO, Chief Counsel
VALERIE D. TOOHEY, Staff Attorney
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
30 Van Ness Avenue, Third Floor
San Francisco, California 94102
Telephone No. (415) 557-1401

Attorneys for the Department

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, vs. ARDEN HILLS SWIMMING AND TENNIS CLUB and SHERMAN CHAVOOR, Owner, Respondents.	Case No. FCR 83-84 E1-0008 ACCUSATION
DEXTER DEL MAR, Complainant.	

MARK GUERRA, in his official capacity as the Director of the Department of Fair Employment and Housing, issues the following Accusation in the name of the Department of Fair Employment and Housing against the Respondent named above:

PRELIMINARY STATEMENT

By this Accusation, the Department of Fair Employment and Housing, California's civil rights enforcement agency, charges Arden Hills Swimming and Tennis Club and Sherman Chavoor, the owner, with violence, and intimidation by threat of violence

against Dexter Del Mar because of his race, ancestry, and national origin, presumed and actual, and with depriving Dexter Del Mar of full and equal accommodations, facilities, privileges and services in the Arden Hills Swimming and Tennis Club because of his race, ancestry, and national origin, presumed and actual.

PARTIES

1. The Department of Fair Employment and Housing (Department) is an administrative agency empowered to receive, investigate, conciliate, and issue accusations alleging violations of sections 51 or 51.7 of the Civil Code under sections 12930(f)(2) and 12965 of the Fair Employment and Housing Act, California Government Code sections 12900 et seq.

2. Respondent Arden Hills Swimming and Tennis Club (Respondent) is a business establishment within the meaning of Civil Code section 51. Respondent Sherman Chavoor owns Arden Hills Swimming and Tennis Club.

STATEMENT OF VIOLATION

3. On October 11, 1983, Complainant Dexter Del Mar (Complainant) filed a verified complaint in writing with the Department alleging that Respondents committed unlawful acts against Complainant in violation of section 12948 of the Fair Employment and Housing Act and sections 51 and 51.7 of the Civil Code, within the preceding one year.

4. Complainant is of Filipino ancestry, but has facial features that can be mistaken for those of a person of Japanese ancestry.

5. On or about September 26, 1983, Complainant

accompanied Cathy and Christina Brydon to the Arden Hills Swimming and Tennis Club to an exercise class that was open to the public. Cathy and Christian Brydon are Caucasian. Complainant waited for his friends in an area where Christina Brydon's 13 year old Caucasian son had waited on prior occasions and where Complainant was told to wait by the exercise class assistant.

6. Shortly after his arrival, Complainant was approached by Respondent Chavoor, who demanded, "Who are you and who are you with?" Complainant explained that he was with friends in the exercise class and was waiting for them.

7. Respondent Chavoor repeated his question, and added, "What are you doing here?" Complainant replied that he had already told him.

8. Respondent Chavoor responded to Complainant, "Don't get smart with me, you yellow Jap. You don't belong here and I want you out of here."

9. When Complainant asked what the problem was, Respondent Chavoor again told Complainant to get out, and threatened to hit the Complainant and call the police unless he left.

10. Complainant again asked what the problem was, to which Respondent Chavoor replied, "I am the owner of this club and I'll have you arrested, you yellow son of a bitch."

11. Complainant went to the exercise room to get the car keys from Cathy Brydon. Respondent Chavoor followed him, continuing to yell demeaning racial epithets and obscenities, and

threatening to call the police.

12. As Complainant and his companion, Cathy Brydon, were leaving the building, Ms. Brydon asked Respondent Chavoor what was going on. Respondent Chavoor replied, "I want you out of here too, sister." When Ms. Brydon said, "Don't worry, we are leaving," Respondent Chavoor threatened, "Just get moving before I hit you too, sister."

13. At that point, Complainant said to Respondent Chavoor: "You're not going to hit anyone." Chavoor then removed his glasses, handed them to a man named "Vern", and shoved Cathy Brydon into Complainant. He then struck Complainant on the chest with both hands, causing him to fall backwards. Complainant pulled Ms. Brydon out of Chavoor's path and continued moving towards the exit.

14. As Complainant and Ms. Brydon passed through the exit, Respondent Chavoor yelled repeatedly, "Get out, you yellow Jap coward."

15. Respondent Chavoor acted maliciously and oppressively in making these comments, threats, and physical assaults.

16. Upon information and belief, Respondent Chavoor has engaged in a pattern of making derogatory racial and ethnic comments. Therefore, Respondents have engaged in a pattern and practice of discrimination on the basis of race, national origin, and ancestry.

17. Respondents actions, as described in paragraphs 4-16 of this Accusation, constitute a violation of section 12948

of the Fair Employment and Housing Act, Government Code sections 12900 et seq.

18. Respondents' conduct, as described in paragraphs 4-16 of this Accusation, constitutes the denial of free and equal accommodations, advantages, facilities, privileges and services in a business establishment on the basis of race, ancestry and national origin, presumed and actual, in violation of Civil Code section 51.

19. The acts of violence and threats of violence perpetrated by Respondent Chavoor because of Complainant's race, national origin and ancestry, presumed and actual, as described above in paragraphs 4-16, constitute violations of Civil Code section 51.7.

STATEMENT OF DAMAGES

20. Respondent Chavoor made the comments, threats, and physical assaults described in paragraphs 4-16 in the presence of numerous individuals gathered at the club, thus causing Complainant to suffer public humiliation and extreme emotional distress.

21. As a result of Respondents' unlawful comments, threats, and acts of violence against Complainant because of his race, ancestry, and national origin, presumed and actual, Complainant suffered and continues to suffer public and personal humiliation and severe emotional distress. The emotional harm caused by Respondents' unlawful conduct has resulted in physical as well as emotional symptoms, including, but not limited to, loss of sleep, cold sweats, a loss of self-confidence and

self-esteem, nervousness, and feelings of hostility and aggression.

22. As a result of Respondents' unlawful and outrageous conduct and the resulting emotional injury to Complainant, Complainant lost his job. This, in turn, caused Complainant to suffer increased emotional injury, loss to his career and financial hardship.

PRAYER FOR RELIEF

WHEREFORE, IT IS PRAYED that the Fair Employment and Housing Commission hold a hearing, find that Respondent has violated the Fair Employment and Housing Act, which incorporates Civil Code sections 51 and 51.7, and order Respondents to:

1. Cease and desist from using violence and the threat of violence because of race, ancestry or national origin against any person who is on the premises of Arden Hills Swimming and Tennis Club;

2. Cease and desist from depriving any person who is on the premises of Arden Hills Swimming and Tennis Club of full and equal accommodations, facilities, privileges or services because of his or her race, national origin or ancestry;

3. Post an order in an area accessible to any persons who are on the premises of Arden Hills Swimming and Tennis Club stating that Respondents have violated the Fair Employment and Housing Act, as it incorporates Civil Code sections 51 and 51.7, by committing acts of violence upon Complainant, and by threatening Complainant with violence, because of his race, national origin and ancestry, presumed and actual;

4. Pay to Complainant $10,000 in statutory damages for each of the seven (7) violations of the Fair Employment and Housing Act as it incorporates Civil Code section 51.7 outlined in paragraphs 8-14, pages 3 and 4, , as provided by Civil Code section 52, subdivision (b);

5. Pay to Complainant all lost wages and other costs which have accrued by reason of Respondents' unlawful conduct;

6. Pay to Complainant reasonable compensatory damages to compensate him for his public humiliation, embarrassment, distress, and other emotional injuries;

7. Pay to Complainant exemplary damages to deter Respondents from future acts of violence, threats, and deprivation of rights based on race, national origin, or ancestry;

8. Pay to Complainant an amount equal to three times Complainant's actual damages, general and special, calculated under paragraphs 5 and 6 of this Prayer, pursuant to Civil Code section 52, subdivision (a), as incorporated by the Fair Employment and Housing Act;

9. Formulate and implement a policy prohibiting discrimination, violence, and threats of violence on the basis of race, ancestry, and national origin; and

10. Take any other action the Commission deems appropriate under section 12970 of the California Government

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Code.

DATED: September 17, 1984

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

JOHN CASTELLO
Chief Counsel

By Valerie D. Toohey pkp
VALERIE D. TOOHEY
Staff Attorney

Attorneys for the Department

COURT PAPER
STATE OF CALIFORNIA
STD 113 (REV 8-72)

THE IMPLEMENTATION AND POSSIBLE IMPACTS OF OPERATION ROLLOUT

by
Craig D. Uchida
Lawrence W. Sherman
James J. Fyfe

September 30, 1981

This evaluation was prepared under Grant Number 80-IJ-CX-0088 from the Adjudication Division, Office of Criminal Justice Programs, Law Enforcement Assistance Administration, U.S. Department of Justice. Points of view or opinions stated in this document do not necessarily represent the official position or policies of the U.S. Department of Justice.

The research reported herein was also supported by the Police Foundation, Washington, D. C. The Police Foundation is a privately and federally funded, independent, non-profit organization established by the Ford Foundation in 1970 and dedicated to supporting innovation and improvement in policing. This report is published as a service. Opinions and recommendations are those of the authors and not necessarily those of the Police Foundation.

EXECUTIVE SUMMARY

This report evaluates Operation Rollout, a program in the Los Angeles County District Attorney's (LADA) Office for investigating shooting incidents involving police officers. Under Operation Rollout, which began in February, 1979, a Deputy District Attorney (DDA) and District Attorney Investigator "roll out" at any hour of the night or day to observe and investigate police shootings in which officers have killed or wounded citizens. Twenty-eight of the 52 police agencies in Los Angeles County participate in Rollout, based on voluntary agreements with the LADA.

The evaluation analyzes all officer-involved shooting cases investigated by the LADA for two years before and two years after Rollout began. It reports on observations of 20 rollouts from November, 1980 to January, 1981, or approximately one-tenth of all the Rollouts in the two years since the program began.

The evaluation report was funded primarily through a $30,000 grant from the Law Enforcement Assistance Administration (LEAA). The Police Foundation provided additional support.

A. Implementation Goals

The process, or "implementation" goals of the program, identified by the LADA were to insure that investigations of police shooting incidents are full, fair, objective, independent, and timely. These are our findings with respect to those central goals of the program:

- o Fullness: Operation Rollout clearly increased the fullness of

the LADA investigations of officer-involved shootings. During the two years of Rollout's existence, the LADA's office has interviewed more civilian witnesses, attended more autopsies, conducted more re-enactments of shooting incidents, and requested to interview more police officer witnesses through the Grand Jury than in the two years before Rollout began.

- Fairness: We could not measure the goal of fairness with any accuracy.

- Objectivity: Some members of the community in Los Angeles County still question the objectivity of the LADA investigations because the DA Investigators have law enforcement backgrounds, but we found no adequate means of measuring this goal. Police agency staff also question the objectivity of Rollout, charging that the LADA teams are "out to get cops."

- Independence: Judging from our observations of 20 Rollouts, the program has done little to increase the independence of the LADA investigations, which still have to rely almost entirely on evidence and witnesses that the police control in the immediate aftermath of the incidents.

- o Timeliness: The LADA's office clearly increased the timeliness of its prosecutorial decisions on police shootings during the Rollout years. The average time for the LADA to complete police shooting investigations was cut in half under Rollout, dropping from 264 to 119 days from the date of the shooting, and from 172 days to 34 days from the date the DA received the police report.

B. Possible Impacts of Rollout

In addition to these implementation goals, we also examined the possible impacts of Rollout on several aspects of criminal justice in Los Angeles.

- o No police officers were prosecuted for unjustifiable use of their weapons during the Rollout years. The Rollout program may have helped to deter the occurrence of any unjustifiable shootings, but we have no way of measuring its impact. Other factors may have deterred their occurrence as well.

- o Rollout has helped to make the LADA decisions in police shooting investigations somewhat more visible than they had been, and the recent LADA policy of sending all "decision letters" on the investigations to the news media should increase public visibility even more.

- o Rollout's implementation is correlated with a long term decline in the frequency of police shootings, but there is no

method available to determine how much of the decline, if any, was caused by Rollout.

- Rollout is also correlated with a decline in the proportion of all police shootings that were "elective" in the sense that they involved no immediate threat to the lives of officers or other innocent citizens, but, again, we have no way of determining how much of the decline was due to Rollout.

- There was virtually no change in the injuries to police officers during officer-involved shootings under Rollout, with the exception of a rise in woundings of LAPD officers from 6 percent of all shooting incidents reported to the DA before Rollout to 15 percent of them during Rollout. Here again it is impossible to know what effect, if any, Rollout had on police injuries, especially since the proportion of all shooting incidents reported to the DA increased during Rollout. The absence of an increase in injuries in the other LA County police agencies participating in Rollout suggests that Rollout alone is not to blame.

- The Los Angeles Police Department (LAPD) and the Los Angeles County Sheriff's Department (LASD), the two largest police agencies in LA County, refused to provide us with data on their

disciplinary actions for police shootings. Their lack of cooperation with our federally-funded evaluation is indicative of the treatment the Los Angeles County District Attorney's Office received in the early days of the Rollout Program. Nineteen departments complied with our request for data on disciplinary action. Only Long Beach was large enough to show any change: an increase in officers disciplined during the Rollout period. Yet again, we cannot say whether Rollout caused this change.

The purpose of this evaluation is to provide information for helping to answer three key questions about the federally-funded operation Rollout: Should LA County continue Rollout? Should other places adopt the program? And should federal funds be used to support Rollout elsewhere? The facts reported in this study can support a variety of conclusions, depending on the value judgments and interpretations one could make about them. The reader can therefore draw his or her own conclusions about those key questions. Police Foundation staff working on this project have also drawn their own personal conclusions, and these are offered as recommendations responding to the key questions.

Evaluation research typically addresses this kind of question in terms of costs and benefits. As a federally-funded program, Rollout costs

at least $283,000 per year (and probably somewhat more) to operate. This figure is approximately 0.57 percent of the total LADA budget of $49.1 million per year and only 0.04 percent of the total Los Angeles County criminal justice system's budget of $730.1 million.* The other costs of Rollout, which we could not measure, are its possible effects on officer morale or general performance. There is fairly good evidence that the program has not resulted in any increase in danger to police officers since the program began. These costs should be seen in the context of the more than 100 officer-involved shootings each year, on average, for which Rollout strengthens the system of checks and balances. And in that context, the cost of $2830 per shooting seems to be relatively minor.

The benefits are a clear increase in the speed and fullness of prosecutorial investigations of police shootings, as well as Rollout's possible contribution to the overall decline in the percentage of shootings that is "elective," and the apparent increase in the visibility of prosecutorial decisions. Whether these definite and not-so-definite benefits outweigh the measured and unmeasured costs of the program can only be a value judgment. In our judgment, they do.

Had greater financial resources and access to confidential police data been available for this study, the costs and benefits would be more clearly defined and the value judgment would be easier to make. But most

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*Figures provided by the Los Angeles County Board of Supervisor's Office reflecting the budget as of July 7, 1981.

decisions are based on imperfect information, and they can rarely be delayed until the quality of the information improves. This report provides at least some additional information about Rollout in time for it to be considered in future funding decisions. The information is far from complete, and on some points it is highly uncertain. But the benefits that are certain seem to outweigh those costs that we could identify. If there are major costs of the program that we have not identified, that conclusion would have to change. Until evidence of such costs becomes available, the existing information leads us to this conclusion.

Perhaps another way to consider the question is what would happen if Rollout were to be discontinued. In a county in which the police have long enjoyed substantially greater freedom from outside control than police in most other areas of the U.S., Rollout has become a symbol of a movement to create greater police accountability. Indeed, Rollout is but a minor issue on the surface of a profound political and philosophical debate over how much autonomy the police should have. In light of that debate, putting an end to Rollout would be perceived as a defeat for the accountability movement and a reassertion of police independence from outside review. It would also weaken the one available check and balance of governmental machinery managing one of the most sensitive race relations issues in the county. For a society in which checks and balances are a major principle of government, their absence in any major political debate can produce serious problems.

In the view of the project staff, then, the benefits of Rollout appear to outweigh the costs. But that does not necessarily mean that Rollout should be continued in its present form. The findings suggest that there are several aspects of both prosecutorial and police procedures in relation to Rollout that can be improved. Our recommendation that Rollout be continued is not contingent upon implementation of those improvements, but we do suggest that the program would be more effective if the recommendations are implemented.

A. Overall we believe that Los Angeles County should continue Operation Rollout, but with major modifications. In general, the LADA should be more aggressive in demanding information and access to information from the police agencies, particularly the LAPD. We urge the implementation of six recommendations that would enhance and strengthen the program:

A_1: The Rollout team should be given complete freedom of movement at all scenes of officer-involved shootings.

A_2: The LAPD should diffuse assignment of command of shooting investigations to a team of rotating, co-equal investigators.

A_3: All police agencies should adopt the LASD format of reporting on their investigations to the LADA, including

transcripts of all interviews. It is of equal importance that all interviews be tape recorded by the police agencies and the LADA.

A_4: The Rollout team should be allowed to observe police interviews of civilian witnesses and should be allowed to interview police witnesses as soon as police investigators have finished with each individual witness.

A_5: The LADA's office should impanel a special Grand Jury to hear testimony from police officer witnesses to the shooting incidents. Lengthy delays in the decision process may be avoided by establishing a special Grand Jury. Although most of the police agencies in LA County have been cooperative with the DA, problems with interviewing police officers persist.

A_6: The LADA's Office should discuss Rollout with police officers at special training sessions or roll calls of all affected police agencies.

B. Other cities should consider adopting a Rollout program if there is a significant absence of public confidence and trust in the objectivity of police shooting investigations.

C. Federal funding of other Rollout programs should be considered only to demonstrate new approaches.

West's CA Codes - Civil

Although § 52 and this section, prohibiting discriminatory practices in "business establishments", contains no express provision for injunctive relief, that remedy as well as damages may be available to an aggrieved person. Burks v. Poppy Const. Co. (1962) 20 Cal.Rptr. 609, 370 P.2d 313, 57 C.2d 463.

34. Review

Though all three causes of action sought both general and punitive damages with respect to alleged civil rights violations, where briefs on appeal discussed only whether complaint stated a cause of action at all, court of appeal would not reach adequacy of pleading as to punitive damage claim. Hales v. Ojai Valley Inn and Country Club (1977) 140 Cal.Rptr. 555, 73 C.A.3d 25, 89 A.L.R.3d 1.

Where reviewing court's conclusion that trial court erred was based upon state law relating to discrimination in sale of housing at time of trial and since trial the United States supreme court ruled that owner's refusal to sell home to Negro for sole reason of his race was violation of Civil Rights Statute [42 U.S.C.A. § 1982] on retrial, trial court must consider effect of such decision in evaluating conduct of seller and brokers with whom seller dealt. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

§ 51.5. Discrimination, boycott, blacklist, etc.; business establishments; equal rights

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, or sex of such person or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

As used in this section "person" includes any person, firm, association, organization, partnership, business trust, corporation, or company.

(Added by Stats.1976, c. 366, p. 1013, § 1.)

Historical Note

Section 3 of Stats.1976, c. 366, p. 1013, provided:

"It is the intent of the Legislature that the State of California by the provisions of this act not preempt this area of concern so that other jurisdictions in the state may take actions appropriate to their concerns."

Library References

Civil Rights ⇐3. C.J.S. Civil Rights §§ 8, 12 to 14, 16.

§ 51.7. Freedom from violence or intimidation

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

(Added by Stats.1976, c. 1293, p. 5778, § 2.)

Historical Note

Section 1 of Stats.1976, c. 1293, p. 5778, provided: "This act shall be known, and may be cited, as the Ralph Civil Rights Act of 1976."

Cross References

Assault and battery, see Penal Code § 240 et seq.

Law Review Commentaries

Mootness: Nonunion employees' conflict with union. (1976) 7 Golden Gate L.Rev. 253, 343.

Library References

Civil Rights ⇐1. C.J.S. Civil Rights §§ 2, 8, 13, 14.

§ 51.8. Discrimination; franchises

No franchisor shall discriminate in the granting of franchises solely because of the race, color, religion, sex, or national origin of the franchisee and the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area in which the franchise is located. Nothing in this section shall be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor.

(Added by Stats.1980, c. 1303, § 1.)

Library References

Civil Rights ⇐2. C.J.S. Civil Rights §§ 2, 8, 13, 14.
Franchises ⇐2. C.J.S. Franchises § 9 et seq.

§ 52. Denial of civil rights or discrimination; damages; civil action by people or person aggrieved; intervention

(a) Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 or 51.5, is liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 or 51.5.

(b) Whoever denies the right provided by Section 51.7, or whoever aids, incites, or conspires in such denial, is liable for each and every such offense for the actual damages, and ten thousand dollars ($10,000) in addition thereto, suffered by any person denied such right. In the case of multiple offenders, the ten thousand dollar ($10,000) fine shall be prorated between them.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights hereby secured, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General, any district attorney or city attorney, or any person aggrieved by the pattern or practice may bring a civil action in the appropriate court by filing with it a complaint (1) signed by the officer (or in his or her absence the individual acting on behalf of the officer) or by the person aggrieved, (2) setting forth facts pertaining to the pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice, as he or she deems necessary to insure the full enjoyment of the rights herein described.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, or national origin, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In such action the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved party.

(Added by Stats.1905, c. 413, p. 553, § 2. Amended by Stats.1919, c. 210, p. 309, § 2; Stats.1923, c. 235, p. 485, § 2; Stats.1959, c. 1866, p. 4424, § 2; Stats.1974, c. 1193, p. 2568, § 2; Stats.1976, c. 366, p. 1013, § 2; Stats.1976, c. 1293, p. 5778, § 2.5; Stats.1978, c. 1212, p. 3927, § 1; Stats.1981, c. 521, § 1, eff. Sept. 16, 1981.)

Historical Note

A section of the same number and covering the same subject was added by the 1901 revision act. Stats.1901, c. 157, p. 334, § 13, however, on the authority of Lewis v. Dunne (1901) 66 P. 478, 134 C. 291, 55 L.R.A. 833, 86 Am.St.R. 257, the 1901 revision act was unconstitutional and void.

As added in 1905, § 52 declared that: "Whoever violates any of the provisions of the last preceding section, by denying

to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges in said section enumerated, or by aiding or inciting such denial, or whoever makes any discrimination, distinction, or restriction on account of color or race, or except for good cause, applicable alike to all citizens of every color or race whatever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, barber shop, bath house, theater, skating rink, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction, or restriction, for each and every such offense is liable in damages in an amount not less than fifty dollars, which may be recovered in an action at law brought for that purpose."

The 1919 amendment rephrased the opening provisions into somewhat more direct language. referred to § 51 instead of to the "last preceding section", corrected some grammatical constructions, added public conveyances to the accommodations included, and increased the statutory damages recoverable.

Places where ice cream or soft drinks of any kind are sold for consumption on the premises were added to the list of accommodations by the amendment of 1923.

The 1959 amendment rewrote the section which had read:

"Whoever denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code, or who aids, or incites, such denial, or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose."

The 1974 amendment included "sex".

The 1976 amendments designated the section as amended in 1974 as subdivision (a) and therein inserted a reference to § 51.5, rewrote that portion following the words "actual damages," and added subdivisions (b), (c), (d) and (e). The rewritten portion of subdivision (a) previously read: "and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

The 1978 amendment provided in subdivisions (c) and (d) that the district attorney or city attorney could institute a civil action or intervene.

The 1981 amendment deleted from subd. (a) following "Section 51 or 51.5", in two places, the words "of this code"; in subd. (c), substituted "there is" for "the Attorney General or any district attorney or city attorney has", inserted "or any person aggrieved by the pattern or practice", in two places in clause (1) substituted "the" for "such" preceding "officer", inserted "or by the person aggrieved", in clause (2) substituted "the" for "such" preceding "pattern" and included "or she" following "he"; and in subd. (d) substituted "the" for "such" preceding "action".

Forms

See West's California Code Forms, Civil.

Cross References

Damages,
- Exemplary, see § 3294 et seq.
- General principles, see § 3281 et seq.
- Interest of damages, see § 3287 et seq.
- Measure of, see § 3300 et seq.

Deeds, invalidity of racial restrictions, see § 782.
Discrimination in housing, see Government Code § 12900 et seq.
Fair employment practices, see Government Code § 12900 et seq.
Relief in general, see § 3274 et seq.
Specific and preventive relief, see § 3366 et seq.

Law Review Commentaries

Affirmative action plans: the implications of Bakke. (1977) 10 U.C.D. Law Rev. 99.

Background and effect of 1959 amendment. (1959) 34 S. Bar J. 587.

California equal rights statutes in practice. Ronald P. Klein (1958) 10 Stan.L.R. 253.

California's new Fair Housing Law. Carmen H. Warschaw (1964) 37 So.Cal. L.R. 47.

Civil actions for damages arising out of violations of civil rights. Nathaniel S. Colley (1965) Hast.L.J. 189.

Commentary on Los Angeles school case. Stephen C. Yeazell (1977) 25 U.C. L.A. Law Rev. 244.

Discrimination against children in rental housing: A California perspective. Baxter Dunaway and Timothy J. Blied (1979) 19 Santa Clara L.Rev. 21.

Employment discrimination against women lawyers. Joan E. Baker (1973) 59 A.B.A.J. 1029.

Implementing school integration. Ben W. Palmer (1959) 45 A.B.A.J. 39.

Injunctive relief under state civil rights statutes. (1957) 8 Hast.L.J. 220.

Layoff and equal employment; retroactive seniority as a remedy under Title VII. (1977) 10 U.C.D. Law Rev. 115.

May private clubs lawfully discriminate? Robert H. O'Brien (1975) 51 Los Angeles Bar J. 9.

Method for analyzing discriminatory effects under equal protection clause. Gary J. Simson (1977) 29 Stan.L.R. 663.

Navy discharge and promotion policies. (1977) 13 C.W.L.R. 317.

On doorsteps of discriminatory private clubs. (1977) 29 Stan.L.R. 747.

Problem of school segregation. William P. Rogers (1959) 45 A.B.A.J. 23.

Punitive damages in housing discrimination suits: Ninth circuit survey. (1978) 9 Golden Gate L.Rev. 59.

Real estate broker and the Civil Rights Act. Rosalyn M. Chapman (Sept.1970) 45 Los Angeles Bar Bull. 475.

Recent cases involving racial segregation. (1956) 42 A.B.A.J. 163.

Relationship between property rights and civil rights. Richard R. B. Powell (1963) 15 Hast.L.J. 135.

Remedies available for the enforcement of the California Civil Rights Statute. (1942) 30 C.L.R. 563.

School segregation cases: a legal error that should be corrected. Charles J. Bloch (1959) 45 A.B.A.J. 27.

Scope of and means for enforcement of Civil Rights Legislation. (1947) 35 C.L. R. 571.

Segregation decisions and the resulting problems of enforcement. Jess Joseph Aguilar and Robert Peter Aguilar (1957) 9 Hast.L.J. 42.

Sex discrimination in housing. (1977) 10 Loyola L.Rev. (Calif.) 820.

Sharing principles and the future of marital property law. Susan Westerberg Prager (1977) 25 U.C.L.A. Law Rev. 1.

State action—a narrowing judicial focus. (1977) 5 Pepperdine L.Rev. 95.

State encouraged discrimination. (Spring 1966) 6 Santa Clara L.Rev. 241.

Statutory control of penalties and damages. Terry Baum (1960) 12 Hast.L.J. 204.

Unruh Civil Rights Act as applied to real estate brokers. (1961) 13 Hast.L.J. 120.

Library References

Civil Rights ⇐68 et seq.
C.J.S. Civil Rights §§ 203, 216 et seq.

Pleading—Civil Actions, Grossman and Van Alstyne, § 636.

Notes of Decisions

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1. Construction and application—In general

For purposes of determining state action component of civil rights action brought under the Civil Rights Act of 1871 (42 U.S.C.A. § 1985(3)), known as the Ku Klux Klan Act, insurance commissioner's failure to disapprove policy forms at time when it was unclear that this section exclusively prohibited discrimination based upon facts could not reasonably be construed as breach of an affirmative duty to enforce § 51 et seq. Reichardt v. Life Ins. Co. of North Americn (D.C. 1979) 485 F.Supp. 56.

Discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Unruh Civil Rights Act. Winchell v. English (1976) 133 Cal.Rptr. 20, 62 C.A.3d 125.

Equal standing before law is concept within equitable jurisdiction and fact that such concept has been denominated by legislator and people as constitutional proposition does not strip it of its equitable nature and derivation. Abstract Inv. Co. v. Hutchinson (1962) 22 Cal.Rptr. 309, 204 C.A.2d 242.

This section and § 51, prohibiting discriminatory practices in business establishments in furtherance of policy against discrimination, were reasonable. Burks v. Poppy Const. Co. (1962) 20 Cal.Rptr. 609, 370 P.2d 313, 57 C.2d 463.

Sections 51 to 54 (former §§ 53, 54 now repealed) granting all citizens right to equal privileges and facilities in all places of public accommodation or amusement were statutory and as such subject to such constitutional change as legislature may choose. Flores v. Los Angeles Turf Club, Inc. (1961) 13 Cal.Rptr. 201, 361 P.2d 921, 55 C.2d 736.

The civil rights statutes are concerned with protection of equal rights with respect to facilities and services offered to the public by private persons. Gardner v. Vic Tanny Compton, Inc. (1960) 6 Cal. Rptr. 490, 182 C.A.2d 506.

Under this section and § 51 expression "all other places" means all other places of like nature to those enumerated, and not all places. Reed v. Hollywood Professional School (1959) 338 P.2d 633, 169 C.A.2d 887.

A store retailing shoes is within § 51 providing that all state citizens are entitled to full and equal accommodations of inns, restaurants, hotels etc. and "all other places of public accommodation" and colored persons who sought to buy shoes at the store of the defendant and were refused because they were members of the colored race were entitled to maintain an action for damages for violation of their civil rights. Lambert v. Mandel's of Cal. (1958) 319 P.2d 469, 156 C.A.2d Supp. 855.

Under this section and § 51, any unreasonable discrimination is forbidden, but if ground of exclusion is reasonable, it is valid. McClain v. City of South Pasadena (1957) 318 P.2d 199, 155 C.A.2d 423.

Section 51 providing that all citizens under state jurisdiction are entitled to full and equal accommodations and privileges in places of public accommodation and amusement, subject only to conditions and limitations established by law, and applicable alike to all citizens and this section must be read and construed together. Id.

2. —— Liberal construction

Unruh Civil Rights Act is to be given a liberal, not a strict, construction with a view to effect its object and to promote justice. Winchell v. English (1976) 133 Cal.Rptr. 20, 62 C.A.3d 125.

The Unruh Civil Rights Act is to be liberally construed. Crowell v. Isaacs (1965) 45 Cal.Rptr. 566, 235 C.A.2d 755.

3. Public policy

Statutes such as the Unruh Civil Rights Act are declaratory of California's public policy against racial discrimination, whether private or public action is involved. Winchell v. English (1976) 133 Cal.Rptr. 20, 62 C.A.3d 125.

Racial discrimination arising from private action is contrary to public policy and may be suppressed without specific statutory authority; accordingly, the absence of reference to labor unions in anti-discrimination statutes such as § 51 and this section, would not prevent granting of relief from discrimination arising from closed shop agreement. James v. Marinship Corporation (1944) 155 P.2d 329, 25 C.2d 721.

4. Hotels and motels

Provisions of the Unruh Civil Rights Act were inapplicable to class action brought by California resident against owners and operators of Hawaiian hotels, seeking to recover for alleged discrimination in rates between mainland tourists and Hawaiian residents, since plaintiff was not arbitrarily excluded from any business premise in Hawaii, nor was she arbitrarily discriminated against in any way, and she did not allege any tort, breach of contract or other actionable wrong. Archibald v. Cinerama Hotels (1977) 140 Cal.Rptr. 599, 73 C.A.3d 152.

An innkeeper who refuses accommodations without just cause, such as inability to pay, infectious disease, or the like, is not only civilly liable but is guilty of a misdemeanor. Id.

Ordinance permitting a hotel to be operated in an R–5 multiple dwelling zone, including any "incidental business" conducted "only as a service to persons living therein," does not restrict the rights, constitutional or otherwise, of individual patrons, since, inter alia, the ordinance is concerned only with the use to which an owner may put his property, since the limitations therein have to do with how the owner holds himself out to the public, not which members of the public may enter the premises to avail themselves of the goods or services offered, and since the reference to a "business" refers to operations which constitute a regular course of business, not the mere casual performance of a service. People v. Gottfurcht (1976) 133 Cal.Rptr. 270, 62 C.A. 3d 634.

5. Real estate—In general

Provisions of Const. Art. 1, § 26 (repealed) prohibiting state from denying right of any person to decline to sell, lease or rent his real property to such persons as he in his absolute discretion chooses would involve state in private racial discriminations to an unconstitutional degree. Reitman v. Mulkey (1967) 87 S.Ct. 1627, 387 U.S. 369, 18 L.Ed.2d 830.

The Unruh Civil Rights Act applies to one engaged in business of selling real estate, whether as an owner or broker. Crowell v. Isaacs (1965) 45 Cal.Rptr. 566, 235 C.A.2d 755.

Negro's complaint which alleged that companies, which were engaged in business of developing, building and selling a tract of housing accommodations, and a bank entered into a conspiracy to impose special restrictions upon sale, financing and occupancy of realty on ground of race, color or creed, in that they agreed and conspired that none of them would sell to, lease to or rent to, or permit occupancy by plaintiff or any other Negro of housing built by defendants or financed by any of defendants was sufficient to state a cause of action against bank. Holmes v. Bank of America Nat. Trust & Sav. Ass'n (1963) 30 Cal.Rptr. 917, 216 C.A.2d 529.

Unruh Civil Rights Act prohibits all forms of arbitrary discrimination by business establishments—including those engaged in sale or rental of real property—against all persons within jurisdiction of California. Specifically enumerated forms of discrimination in said Act are illustrative rather than restrictive. 58 Ops.Atty. Gen. 608, 8–21–75.

Because of the incomplete nature of the legislative scheme in the field of housing discrimination, failure to express a preemptive intent in housing when at the same time such an intent was expressed in employment, and because of the strong policy opposing racial and religious discrimination, the Legislature did not intend to preclude the enactment by cities of ordinances in the field of housing discrimination. 40 Ops.Atty.Gen. 114.

6. —— Brokers and agents, real estate

Real estate broker, who in disregard of agreement with owner to rent to any member of public, refuses to rent to a particular prospective tenant, is denying services to that person within contemplation of § 51 providing that all persons are entitled to full and equal facilities, privileges or services in all business establishments of every kind whatsoever. Lee v. O'Hara (1962) 20 Cal.Rptr. 617, 370 P.2d 321, 57 C.A.2d 476.

7. —— Rentals, real estate

Plaintiffs stated cause of action for general and statutory damages on basis that defendant had refused application of plaintiff to rent defendant's apartment for sole reason that plaintiff was member of Negro race. Thomas v. Goulis (1966) 50 Cal.Rptr. 910, 413 P.2d 854, 64 C.2d 884.

Note 7

Cause of action was stated on theory of discrimination with respect to renting of apartment in rental housing project development in connection with which defendant landlord had received public assistance. Peyton v. Barrington Plaza Corp. (1966) 50 Cal.Rptr. 905, 413 P.2d 849, 64 C.2d 880.

Const. Art. 1, § 26 (repealed), prohibiting state from denying right of any person to decline to sell, lease or rent his real property to such persons as he in his absolute discretion chooses constituted affirmative action on part of state to change its existing laws from situation where discrimination as legally restricted to one wherein it was encouraged and thus denied to Negro plaintiffs, whose offer to rent unoccupied apartments was denied solely on ground that they were Negroes and denied to those similarly situated equal protection of laws as guaranteed by Fourteenth Amendment to Federal Constitution and section was void in its general application. Mulkey v. Reitman (1966) 50 Cal.Rptr. 881, 413 P.2d 825, 64 C.2d 529, affirmed 87 S.Ct. 1627, 387 U.S. 369, 18 L.Ed.2d 830.

Negro tenant was not precluded from proving allegation of racial discrimination in unlawful detainer action because, hypothetically, Negro could terminate tenancy because landlord was white person. Abstract Inv. Co. v. Hutchinson (1962) 22 Cal.Rptr. 309, 204 C.A.2d 242.

8. —— Realty boards, real estate

Where this section imposed liability upon anyone who aided or incited denial of equal privileges, this section would apply to realty board if evidence showed that board was party to agreement or concerted action to discriminate against Negroes in their purchase of house. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

A local realty board may not exclude otherwise qualified applicants from membership solely on grounds of color, race, religion, ancestry, or national origin, and such exclusion is in violation of § 51 and this section. 40 Ops.Atty.Gen. 174.

9. —— Residency, real estate

This section was not applicable to action by nine year old Negro girl against city and officers and employees thereof for damages for unlawfully excluding her from municipal plunge which city had by regulation limited to use of residents only. McClain v. City of South Pasadena (1957) 318 P.2d 199, 155 C.A.2d 423.

Regulation excluding all nonresidents, irrespective of race, color, or creed, from use of municipal plunge bore a reasonable and substantial relation to the health, safety, morals, and general welfare of the residents of the city and was a reasonable classification. Id.

10. Physicians

Plaintiffs were not precluded from recovery of damages from a physician based on refusal of service by reason of plaintiffs' race or color on theory such actions constituted an attempt to compel a physician to treat an unwelcome patient. Washington v. Blampin (1964) 38 Cal. Rptr. 235, 226 C.A.2d 604.

The "services in all business establishments," to which all persons ure entitled under the Unruh Act regardless of race or color, include the services of a physician. Id.

11. Theaters

With respect to alleged discrimination by operator of motion picture theater, federal antidiscrimination statutes (42 U.S. C.A. §§ 1983, 2000a) are no broader in application than this section and § 51. Marsh v. Edwards Theatres Circuit, Inc. (1976) 134 Cal.Rptr. 844, 64 C.A.3d 881.

It was a violation of § 51, and this section, for the management of a moving picture theater to refuse plaintiff, a negro, a seat except in a section set apart for the so-called dark races, solely on account of plaintiff's color and race. Jones v. Kehrlein (1920) 194 P. 55, 49 C.A. 646.

While a theater ticket by which the holder was to be admitted to such seat as might be assigned by the management gave the management a right to adjust the seating of the audience and to select, within legal bounds and for legal reasons, the seats of its various patrons, it was invalid so far as it authorized the management to require a negro to sit in a particular section solely because of his race and color. Id.

Under former § 53, making it unlawful to refuse admittance to any theater, etc., to any person over 21 presenting a ticket of admission, does not prevent a minor from recovering under § 51 and this section, for refusal to allow him to sit anywhere except in a particular section, where he was not discriminated against because of his minority, but because he was a negro. Id.

12. Schools

Private school is not place of "public accommodation" or amusement, nor is it "public place" of amusement or accommodation, within this and section 51. Reed

v. Hollywood Professional School (1959) 338 P.2d 633, 169 C.A.2d Supp. 887.

Where private school refused to enroll minor Negro because of her race, school had no monopoly, and legislature and specifically declared public policy in regard to discrimination in particular locations which did not include private schools, public policy against racial discrimination did not apply. Id.

13. Liability for acts of agent

Whether this section is penal or not, a person excluded by the manager of a theater because of race or color can recover thereunder against the theater proprietor, who neither ordered nor knew of this or a like exclusion, as, by § 2338, and also by general law, a principal is liable for the wrongful acts committed by his agent in the transaction of the business of the agency. Prowd v. Gore (1922) 207 P. 490, 57 C.A. 458.

14. Employment

The Unruh Civil Rights Act does not encompass discrimination in employment. Van Hoomissen v. Xerox Corp. (D.C. 1973) 368 F.Supp. 829.

Section 51 and this section referring to right to equal accommodations, advantages, facilities, or services in business establishments encompassed discrimination only in course of furnishing goods, services or facilities to clients, patrons or customers and do not encompass discrimination in employment. Alcorn v. Anbro Engineering, Inc. (1970) 86 Cal.Rptr. 88, 468 P.2d 216, 2 C.3d 493.

15. Handicapped persons

Section 51 has no application to discrimination against physically handicapped. Marsh v. Edwards Theatres Circuit, Inc. (1976) 134 Cal.Rptr. 844, 64 C.A.3d 881.

16. Conspiracy

Listing broker's conduct in effectuating odd type sale to third party after owner had turned down offer by plaintiffs who were Negroes may reasonably be held to be act in carrying out conspiracy to deny plaintiffs benefit of services of real estate broker. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

17. Pleading

Complaint alleging that due to his sex plaintiff was denied services, advantages, accommodations, facilities, and privileges accorded to other persons in defendant's food and drink establishment was sufficient to state a cause of action under Unruh Act as against a general demurrer. Hales v. Ojai Valley Inn and Country Club (1977) 140 Cal.Rptr. 555, 73 C.A.3d 25, 89 A.L.R.3d 1.

On special demurrer to complaint for alleged arbitrary discrimination arising from requirement in defendant's food and drink establishment that men wear ties but women need not, plaintiff might well, in discretion of trial court, be acquired to allege some facts in more detail, but complaint was sufficient to indicate nature of plaintiff's contention and, hence, to state a cause of action which was good as against a general demurrer. Id.

Civil rights complaint which alleged that defendant, who had exclusive right to sell plaintiffs' house, failed affirmatively to seek out Negro buyers and to advertise affirmatively that buyers of all races were invited to purchase did not show the required denial of equal rights or discrimination on account of race or color. Crowell v. Isaacs (1965) 45 Cal.Rptr. 566, 235 C.A.2d 755.

Complaint charging that real estate broker's refusal to sell home to plaintiffs because of their Mexican ancestry and that such conduct was in violation of § 51 and this section, prohibiting discrimination in rendering of services in all business establishments of every kind whatsoever, was sufficient to state a cause of action for injunctive relief but was subject to special demurrer for uncertainty as to whether plaintiffs were complaining of broker's actions solely as they related to conducting of his own business or of broker's actions as agent of third parties. Vargas v. Hampson (1962) 20 Cal.Rptr. 618, 370 P.2d 322, 57 C.2d 479.

A complaint for damages under this section and § 51, for causing removal from a hotel showed a causal connection between the defendant's act and plaintiff's removal. Piluso v. Spencer (1918) 172 P. 412, 36 C.A. 416.

18. Discovery

In prosecution of jail inmate for his battery of deputy sheriff which allegedly occurred when he failed to leave visiting area of jail when requested to do so at close of visting hours, trial court did not abuse its discretion in refusing to require prosecution to produce record of all batteries committed by inmates or officers of jail for prior two-year period, together with criminal prosecutions, and disciplinary proceedings instituted in connection therewith, despite defendant's assertion that such information might show that he was victim of discriminatory law enforcement in that significantly more prisoners

than jailors were prosecuted for batteries committed in jail. Robinson v. Superior Court of Los Angeles County (1978) 143 Cal.Rptr. 328, 76 C.A.3d 968.

19. Stipulations

Where stipulation which provided that, if Negro purchasers who claimed they were discriminated against in acquisition of home did in fact obtain home, suit against listing broker would be dismissed was not consummated within time provided for by stipulation, fact that purchasers ultimately obtained house did not entitle listing broker to dismissal of action by purchasers against him. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

20. Admissibility of evidence

In an action under § 51, and this section, for causing removal from a hotel, evidence of defendant's treatment of plaintiff in other respects was admissible to show malice and as indicative of oppression. Piluso v. Spencer (1918) 172 P. 412, 36 C.A. 416.

In an action under § 51, and this section, for causing removal from a hotel, a letter from defendant to the proprietor asking him to inform plaintiff he would need his rooms and that board would be doubled was admissible to show malice and hostility. Id.

In an action against an innkeeper for refusal to entertain plaintiff, an invalid, thereby preventing him from receiving the benefit of the water of a mineral spring appurtenant to the hotel, from which it is alleged that he had derived much benefit theretofore, it is not error to allow plaintiff to testify that deprivation of the water had injured his health. Willis v. McMahan (1891) 26 P. 649, 89 C. 156.

21. Sufficiency of evidence

Evidence in action by Negroes who claimed that they were discriminated against in attempting to purchase home supported inference that treatment accorded plaintiffs was part of group plan or understanding among individual brokers and their trade association. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

Evidence in action by Negro purchasers claiming that they were discriminated against in acquisition of home sustained finding that seller made her own decision to refuse to make sale uninfluenced by any deception on part of brokers and warranted dismissal of seller's cross complaint against brokers. Id.

Evidence, on issue as to plaintiffs' right to sue innkeeper for refusal because of color, of accommodations to four other persons, would not sustain finding that plaintiffs had acted as agents for the four persons allegedly denied accommodations. Kennedy v. Domerque (1955) 290 P.2d 85, 137 C.A.2d Supp. 849.

In action for damages for alleged denial of plaintiffs' rights under statute, evidence that other persons were served with food and drinks at bar in defendant's cafe, but that plaintiffs were refused such service because they were colored, sustained judgment for plaintiffs. Evans v. Fong Poy (1941) 108 P.2d 942, 42 C.A.2d 320.

In action to recover for discrimination in restaurant accommodations, evidence sustained finding for defendant. Gilmore v. Paris Inn (1936) 51 P.2d 1103, 10 C.A.2d 353.

22. Findings

Findings against seller on her cross complaint against brokers were not binding upon plaintiffs who brought action against seller, brokers, and their trade association for alleged discrimination in connection with plaintiffs' purchase of house. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

Findings showed plaintiff was denied full accommodations at soda fountain on account of race, in violation of § 51 and this section. Hutson v. Owl Drug Co. (1926) 249 P. 524, 79 C.A. 390.

23. Instructions

In an action under this section and § 51, for causing removal from a hotel, a refused instruction that the law does not require the keeper to furnish a place of residence or business was too sweeping. Piluos v. Spencer (1918) 172 P. 412, 36 C.A. 416.

In an action under § 51, and this section, for causing removal from a hotel, a statement in a refused instruction was covered by a part of the charge. Id.

Where there is no evidence that defendants refused to allow plaintiff the use of the water, it is not error to refuse defendants' request to instruct that they were not bound to furnish such water. Willis v. McMahan (1891) 26 P. 649, 89 C. 156.

24. Punitive or exemplary damages

In an action under § 51, and this section prior to the 1919 amendment, for causing removal from a hotel, the jury might award punitive damages for malice or oppression in excess of $50 minimum fixed

by this section prior to said amendment. Piluso v. Spencer (1918) 172 P. 412, 36 C.A. 416.

Where a colored woman, hailed the conductor of a street car, requesting him to take her on board, which he failed to do, and conductor stated immediately after, in reply to a request of a passenger to take plaintiff up as requested, that "we don't take colored people in the cars," and there was at the time ample room in the car to accommodate plaintiff, who was ready and willing to pay the fare, there being no evidence of malice, ill will, or wanton conduct towards plaintiff on the part of defendant, it was not a case for exemplary damages. Pleasants v. North Beach & M. R. Co. (1868) 34 C. 586.

25. Injunction

Although § 51 and this section, prohibiting discriminatory practices in "business establishments", contains no express provision for injunctive relief, that remedy as well as damages may be available to an aggrieved person. Burks v. Poppy Const. Co. (1962) 20 Cal.Rptr. 609, 370 P.2d 313, 57 A.C. 503.

26. Mandamus

A petition for mandamus by members of Negro race to compel city officials to admit petitioners to facilities of municipal plunge when such facilities were open to the public, which petition alleged that petitioners were of clean and moral habits, suffered from no contagious or infectious diseases and had no physical or mental defects or disabilities so as to make admission to plunge detrimental to health of other persons, stated cause of action, and if facts alleged were true, mandamus was proper remedy to secure relief sought. Stone v. Board of Directors of City of Pasadena (1941) 118 P.2d 866, 47 C.A.2d 749.

27. Review

Where reviewing court's conclusion that trial court erred was based upon state law relating to discrimination in sale of housing at time of trial and since trial the United States Supreme Court ruled that owner's refusal to sell home to Negro for sole reason of his race was violation of Civil Rights Statute [42 U.S.C.A. § 1982] on retrial, trial court must consider effect of such decision in evaluating conduct of seller and brokers with whom seller dealt. Wagner v. O'Bannon (1969) 79 Cal.Rptr. 44, 274 C.A.2d 121.

The appellate court could not order writ of mandate to issue to compel city officials to admit members of Negro race to privileges and facilities of a municipal plunge at time when such facilities were open to the public where there were certain controverted issues which should have been determined by trial court. Stone v. Board of Directors of City of Pasadena (1941) 118 P.2d 866, 47 C.A.2d 749.

§ 53. Restrictions upon transfer or use of realty because of sex, race, color, religion, ancestry or national origin

(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified sex, race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, or national origin is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's sex, race, color, religion, ancestry, or national origin is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court takes judicial notice of the recorded instrument or instruments con-

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A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause

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Since its adoption in 1868, the equal protection clause of the 14th amendment[1] has undergone three phases of interpretation in the Supreme Court. Initially, the Court read its command that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"[2] as a ban on only the most arbitrary classifications. If the state arguably was serving a lawful goal or goals by treating some persons less favorably than others, the Court upheld the classification. The Court readily hypothesized valid state objectives and strained its imagination to establish that the challenged classification was indeed rationally related to an objective or objectives of this sort.[3]

The equal protection clause then became a more formidable constraint on the lawmaker during Chief Justice Warren's tenure with the Court's development of a "2-tier"[4] doctrinal approach. Under this approach, the Court abandoned the traditional rational relation inquiry in favor of "strict scrutiny" whenever it found that the state treated persons differently either on the basis of a "suspect" criterion, such as race,[5] or with respect to an interest of "fundamental" importance, such as voting.[6] On

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1. U.S. CONST. amend. XIV, § 1.

2. *Id.*

3. *See, e.g.*, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See generally* Tussmann & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

4. The phrase apparently originated with Professor Gunther. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972).

5. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). For a discussion of equal protection developments during the Warren Court years, see Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 732-46 (1969).

6. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

these occasions, the Court struck down classifications based on suspect criteria unless the state could show that they served lawful state interests perfectly or as well as possible in light of the time available for their formulation,[7] and it invalidated those affecting fundamental interests unless the state could show that they were necessary to promote compelling state interests.[8] Stated another way, the Warren Court replaced a single test for constitutionality under the equal protection clause with two, both of which every classification had to pass. One focused on *who* was being disadvantaged and required great or little precision in classification depending on the untrustworthiness of the *basis* upon which the state discriminated. The other focused on *how* some people were disadvantaged and required great or little justification from the state for disadvantaging them depending on the gravity of the discriminatory *effect*.

With the retirement and replacement of the Chief Justice and several Associate Justices of the Warren Court, interpretation of the equal protection clause has entered yet a third phase. Formally, the Burger Court remains committed to its predecessor's 2-tier approach.[9] As illustrated in Part I of this Article, however, the Burger Court in practice has moved away in various respects from the Warren Court's express test for determining whether or not classifications have unconstitutionally discriminatory effects. Although the present Court also may have departed tacitly from the Warren Court's *discriminatory basis* test,[10] this Article will attend exclusively to its evolution of the *discriminatory effect* test. Since the two tests are logically independent and the Supreme Court has treated them as discrete inquiries,[11] they may be discussed separately.

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7. The author of this Article has developed at length the thesis that the Court applies "strict scrutiny" to suspect classifications in this fashion. Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1245-52 (1974). *But see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101-04, 1121-23, 1132 (1969) (equating suspect classification test with one for fundamental interests described in text accompanying note 8 *infra*).

8. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

9. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 509-10 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

10. By comparing, for example, Stanton v. Stanton, 421 U.S. 7 (1975) with Schlesinger v. Ballard, 419 U.S. 498 (1975) and Gomez v. Perez, 409 U.S. 535 (1973) (per curiam) with Mathews v. Lucas, 427 U.S. 495 (1976), one reasonably may conclude that the Court treats sex and legitimacy of birth, respectively, as untrustworthy, but not suspect, bases for classification. *See also* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATH. U.L. REV. 217, 228-31, 233-35 (1975) (criterion for relative untrustworthiness in classification); note 49 *infra*.

11. *See* Note, *supra* note 7, at 1245-52, 1268-69. For the view that the rigor of judicial review under the equal protection clause turns on some *combination* of the untrustworthiness of the discriminatory basis and the gravity of the discriminatory effect, see Karst, *supra* note 5, at 744-45; Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L.L. REV. 103, 105-07 (1972).

Several members of the Court[12] and various commentators[13] already have observed that results reached by the Burger Court in discriminatory effect cases belie its avowed adherence to a bilevel test. These authorities differ widely, however, in their perceptions of the direction that the Court's analysis has taken. Justice Marshall, for example, maintains that the Burger Court's decisions reveal a far more flexible approach than the one to which the Court continues to claim allegiance.[14] In his view, the Court has used a "spectrum of standards"[15]—in effect, a sliding-scale test that examines the "substantiality of the state interests sought to be served" and the "reasonableness of the means by which the State has sought to advance its interests"[16] more or less carefully according to the greater or lesser importance of the individual interest affected.[17] Professor Gunther, on the other hand, argues[18] that, except in cases involving interests denominated fundamental by the Warren Court, the Burger Court has applied—or at least gravitated toward applying[19]—a single standard of review. Strict scrutiny therefore continues to be applied when fundamental interests are involved.[20] On other occasions, the traditional rational relation test is "intensified"[21]—activated with "new bite."[22] The reviewing

12. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting); *id.* at 98-99 (Marshall, J., dissenting, joined by Douglas, J.).

13. *See* Gunther, *supra* note 4, at 18-20; Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1071-75 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 950-53, 1017 (1975).

14. Justice Marshall first described this development in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting), and has continued to articulate it in subsequent years. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting). Prior to 1973, he insisted that the Court *ought* to be using a test much like the one he later detailed in *Rodriguez*, but he did not claim that it in fact was doing so. Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-22 (1970) (Marshall, J., dissenting).

15. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

16. *Id.* at 124.

17. Justice Marshall would determine the importance of the affected interest by gauging the extent to which "constitutionally guaranteed rights" depend upon it. *Id.* at 102.

18. Professor Gunther first outlined the Court's doctrinal shift in his 1972 *Harvard Law Review* "Foreword." *See* Gunther, *supra* note 4. In the 1975 edition of his casebook, he invites readers to infer that his 1972 observations accurately describe later developments. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 659-65, 870-71 (9th ed. 1975).

19. In his 1972 article, Professor Gunther indicated that his model was only "suggested" by the Court's recent decisions. Gunther, *supra* note 4, at 20. Furthermore, aside from not claiming complete descriptive accuracy for his model, he emphasized its partly prescriptive thrust. *See id.* at 37-38.

20. *Id.* at 15, 24.

21. *Id.* at 36.

22. *Id.* at 21.

court considers only those validating objectives argued by the state,[23] and the state must offer firm proof that the classification substantially furthers the articulated goal. Presenting another explanation of recent developments, Professor Nowak agrees with Gunther that the Court has relocated the Warren Court's two tiers of review but concludes that the Court has dropped the upper tier rather than, as Gunther asserts, raised the lower one.[24] From Nowak's perspective, the Court in adjudicating fundamental interest cases applies a "demonstrable basis"[25] standard of review—essentially Gunther's "intensified rationality" test supplemented by a demand on the state to supply "factual support"[26] that the lawmaker was attempting to serve the asserted state interest. In all other cases, the Court decides constitutionality in discriminatory effect by the time-honored rationality standard.[27]

This Article's analysis in Part I of the Burger Court's activities approximates Justice Marshall's understanding of the operative discriminatory effect test more nearly than it does Gunther's or Nowak's, but it varies materially from any one of these three perhaps best-known accounts.[28] It suggests that the Court has adopted a 4-factor balancing test with each factor graded more finely than those that figure in the Warren Court formulation. Moreover, among the four factors that it isolates as determinative of the Court's discriminatory effect decisions is one—a magnitude-of-disadvantage factor—that the other accounts wholly ignore.

Drawing on the analysis in Part I, Part II proposes a model for deciding constitutionality in discriminatory effect that follows the general contours of the perceived 4-factor approach. Although the tensions between the approach that the Court says it is using and the one that it actually is using are relatively clear, the precise parameters of the latter approach are not. In all probability, the Court has not agreed upon them. The model therefore does not pretend to describe a full-blown methodology discerned in the Court's collective mind. Nonetheless, it does claim to describe the Court's operative approach more accurately than either the one to which the Court

23. According to Gunther, this objective need not be one "explicitly set forth in a statutory preamble or the legislative history. A state court's or attorney general office's description of purpose should be acceptable." *Id.* at 47.

24. Nowak, *supra* note 13. Like Gunther, *see* note 19 *supra*, Nowak does not purport to reconcile all the decided cases or to be strictly descriptive.

25. Nowak, *supra* note 13, at 1093-94.

26. *Id.* at 1094.

27. *Id.*

28. Among the various other equal protection models that have been suggested are some that their authors do not represent as descriptively accurate. *See, e.g.*, Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973); Wilkinson, *supra* note 13.

overtly subscribes or any of the three outlined above. As such, it offers the Court better opportunities than any of the other models to dispel the appearance of unprincipled decisionmaking that attends its current method of explaining its results in discriminatory effect cases and to provide much-needed guidance for the lower courts in deciding the novel and not-so-novel discriminatory effect questions that will come before them.

Greater descriptive accuracy, however, is not the proposed model's only advantage over the model to which the Court formally adheres and others that this Article has discussed. It is also contended that the suggested approach strikes a superior balance between the conflicting jurisprudential demands of flexibility and concreteness that confront any model of this sort. On the one hand, while less responsive to variations in discriminatory effects and governmental justifications than a sliding scale that, unlike Justice Marshall's, takes magnitude of disadvantage into account, it avoids the rather extreme insensitivity in this regard that besets the Warren Court, Gunther and Nowak bilevel tests. It offers sufficient flexibility to keep to a minimum instances in which individuals are allowed to suffer discrimination on the basis of a governmental justification not comparable in magnitude to the discriminatory effect or in which states are precluded from enjoying the cost savings offered by a particular classification[29] on the basis of a discriminatory effect not comparable in magnitude to the governmental justification. On the other hand, while more manipulable and unwieldy than any of the 2-tier models described, it avoids the also rather extreme subjectivity that accompanies a sliding scale. It provides guidelines sufficiently concrete both to hold to a tolerable level the intrusion of individual judges' personal value preferences and to allow for meaningful appellate review. Consistent and objective application by the Supreme Court and other courts is not assured, but it is a reasonable hope.[30]

Part III seeks to establish that, by adopting the model put forward in this Article, the Court would not threaten seriously the vitality of Warren and Burger Court precedents. To do so, it analyzes the validity in terms of the model of the great majority, if not almost all, of the leading equal

29. On the economics of classification, see Note, *supra* note 7, at 1237.

30. This is not to say that individual Justices' views about courts' competence and constitutional authority to sit in judgment on the precision of legislative means and the weightiness of legislative ends reasonably may not lead them to decide that one or more of the models sketched above meets these jurisprudential demands better than the test offered in this Article. It is believed, however, that the attitudes toward judicial review informing the proposed model conform closely enough to those prevailing on the Court that many, if not all, of the Justices at least will be open to its claim of jurisprudential superiority to the other models at hand.

protection decisions of the past twenty years in which the Court focused upon discriminatory effect. Though not an attempt, as such, to reconstruct the Court's actual thought processes, it is hoped that this survey of the case law will also be valuable in suggesting factors unmentioned or merely intimated in the Court's opinions that in fact led it to decide the cases as it did. Additionally, by offering an extended opportunity to observe the model in action, it should help readers decide how well the model copes with the jurisprudential problems endemic to any such attempt. For readability an effort has been made to be selective in the number of case analyses carried in the text. Those that seem to contribute less significantly to understanding the Court's thinking in the case and the operation of the model appear in the footnotes.[31]

Finally, Part IV defends two major premises held by the Court from which the partly descriptive model detailed in this Article proceeds: the existence of constitutional authority for courts to demand more or less justification from the state depending upon the gravity of the discriminatory effect, and the propriety of making an interest's roots in the constitutional text the touchstone for fundamentality.

I. New Directions in the Court's Analysis

A. *Nature of the Affected Interest*

The Burger Court is yet to disavow openly the Warren Court's division of the universe of individual interests into those fundamental and those not.[32] It has acknowledged tacitly, however, that some interests lacking the constitutional nexus that it identifies with fundamentality[33] are more important than others.[34] The tension between *Jimenez v. Weinberger*[35] and *Marshall v. United States*,[36] two 1974 cases in which the Court reached opposite results in reviewing laws affecting nonfundamental interests, evidences this greater flexibility. The *Jimenez* Court professed to apply a rational connection test but examined the law before it with a rigor quite unlike that traditionally associated with rationality review. *Marshall* confirms that scrutiny of this sort for rationality remains atypical and helps

31. In assigning analyses to the footnotes, some care also has been taken to preserve in the text the balance that prevails overall between cases supported by the model and those undermined by it.

32. *See* note 9 *supra*.

33. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

34. For a discussion of and citation to some of the Justices' express recognition of this development, see note 14 *supra* and accompanying text.

35. 417 U.S. 628 (1974).

36. 414 U.S. 417 (1974).

trace its presence in *Jimenez* to the nature of the interest affected by the classification at issue.

In *Jimenez* the Court considered the portion of the social security program dealing with insurance benefits awarded to children of disabled wage earners. Under the Social Security Act as it then stood, all children qualified for children's insurance benefits except illegitimate children who satisfied *all* of the following four conditions: they had not been legitimated; they did not owe their illegitimacy solely to nonobvious defects in their parents' marriage ceremony; they were not eligible under state law to inherit their parents' personal property by intestate succession; and they were not supported by, nor did they live with, the disabled wage-earner parent when the latter's disability began.[37] Eugenio and Alicia Jimenez met the last-named condition because they were born out of wedlock after their father became disabled. Since these illegitimate children also met the other enumerated conditions, they were denied the benefits offered by the Act. A 3-judge district court rejected the two children's claim that the statute denied them the equal protection of the laws that the fifth amendment's due process clause implicitly requires the federal government to afford.[38] On appeal the Supreme Court expressly tested the statute by the rational connection standard of review reserved for laws affecting nonfundamental interests and found it constitutionally defective. According to the Court, the statutory scheme distinguished "without any basis"[39] between two groups of illegitimate children born subsequent to the disability of wage earners who assert that they are the children's parents.

In *Marshall* the Court reviewed provisions of the federal Narcotic Addict Rehabilitation Act[40] (NARA) that give federal judges discretion to sentence narcotic addicts found guilty of a federal offense to commitment in a rehabilitative, rather than penal, facility provided that they meet certain requirements set by the Act. These requirements include a record showing no more than one prior felony conviction.[41] Since Robert Edward Marshall, a narcotic addict, already had three such convictions when he came up for sentencing, the judge refused to consider him for the special treatment authorized by the Act. The court sentenced him to 10 years imprisonment and, after serving 10 months of his term, Marshall moved to vacate the sentence on the theory that the 2-prior-felonies exclusion

37. 42 U.S.C. §§ 402(d)(3), 416(h)(2)-(h)(3) (1970).

38. Jimenez v. Richardson, 353 F. Supp. 1356 (N.D. Ill. 1973) (3-judge court) (per curiam). On the fifth amendment's equal protection component, see Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

39. 417 U.S. at 636.

40. 18 U.S.C. §§ 4251-4255 (1970).

41. *Id.* § 4251(f)(4).

violates the fifth amendment's equal protection component. The federal district and appellate courts upheld the classification.[42] Invoking the traditional rational relation test, the Supreme Court affirmed.

A comparison of the Court's reasoning in the two cases indicates that it held the law before it in *Jimenez* to a more rigorous standard of rationality than it traditionally applied and than it applied in *Marshall*. In *Jimenez* the Court arrived at its conclusion of an irrational connection by following a markedly aggressive and interventionist tack. First, Chief Justice Burger, the author of the majority opinion, identified the classification's under- and overinclusiveness in terms of the Government's alleged interest in weeding out spurious claims. On the one hand, since some afterborn illegitimates who have been legitimated or who can inherit under state intestacy laws or who are only technically illegitimate are not dependent on their disabled parent, the statutory scheme to some extent rewards spurious claims. On the other hand, since some afterborn illegitimates who fall into none of these categories are dependent on their disabled parent, it to some extent excludes valid claims.[43] Then, pointing to the absence of any evidence in the record that the disadvantaged subclass of illegitimates poses any greater danger of collusive claims than the advantaged subclass, the Court inferred that the potential for fraud arising from the two subclasses is the same.[44]

The Court's approach in *Marshall* is a study in contrast. It harks back to the deferential analysis of traditional rational relation review. In terms of NARA's stated purpose of helping those addict offenders "likely to be rehabilitated through treatment,"[45] the 2-prior-felonies exclusion is plainly under- and overinclusive. On the one hand, since some addicts previously convicted of two or more felonies are good candidates for rehabilitation, the statute to some extent precludes consideration of persons fit for special treatment. On the other hand, since some addicts previously convicted of fewer than two felonies are poor candidates for rehabilitation, it to some extent requires consideration of persons unfit for special treatment.[46] Writing for the Court, however, the Chief Justice barely adverted to this imperfection in the classification. Instead, he

42. Marshall v. Parker, 470 F.2d 34 (9th Cir. 1972) (district court order unreported).

43. 417 U.S. at 636-37.

44. *Id.* at 637.

45. 42 U.S.C. § 3401 (1970).

46. The judge's subsequent exercise of discretion in selecting persons for special treatment from the available pool substantially remedies the statute's overinclusiveness in terms of limiting *special treatment* to addict offenders likely to benefit from such care. It has no bearing, however, on the law's overinclusiveness in terms of limiting *consideration for special treatment* to only good candidates for the rehabilative treatment selectively offered.

emphasized the deference due "a policy choice in an experimental program made by that branch of Government vested with the power to make such choices"[47] and agreeably conceded that "[t]he line drawn by Congress at two felonies . . . might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice."[48]

The relative precision of the two classifications reinforces the impression that the Court in *Jimenez* was engaged in a suprarational type of review. Though far from perfect, the classification in *Jimenez* was good enough to survive a traditional rationality test. Congress reasonably could have concluded that afterborn illegitimates who possess one or more characteristics indicating their kinship with a disabled wage earner are more likely to be actually dependent on the latter than ones who do not, and rationality historically required no more. Further, however arbitrary the classification in *Jimenez* may have been, the one approved in *Marshall* was no better. If Congress had designated *one* prior felony as the disqualifying criterion, a convincing argument might be made that Congress acted more rationally in deciding which addict offenders should be eligible for special treatment under NARA than in deciding which afterborn illegitimates should be eligible for children's insurance benefits under the Social Security Act. That is, first-time felons, persons who have shown no pattern of serious antisocial tendencies, may be distinguished more easily from second-time felons, persons who have begun to show such a pattern, as far as amenability to measures to cure their narcotics addiction is concerned than the two subclasses of afterborn illegitimates as far as actual dependence. But one prior felony is *not* the condition upon which Congress made disqualification for consideration for special treatment under NARA turn. Two is. As a result, the two classifications have about equally little in the way of precision to recommend them.

Perhaps the most plausible explanation for the Court's more careful scrutiny of the law before it in *Jimenez* than required by the traditional rationality test and than exercised in *Marshall* is that it held the interest at issue in *Jimenez* in particular esteem.[49] Both the subsistence interest af-

47. 414 U.S. at 428.

48. *Id.*

49. In applying an intensified rational relation standard, the Court instead, or perhaps additionally, may have been responding to the relative trustworthiness of the discriminatory basis. Although the Court has subsequently indicated that it does not consider legitimacy classifications to be suspect, Mathews v. Lucas, 427 U.S. 495, 506 (1976), various of its prior decisions, *see, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968), are consistent with the thesis that it regards classification on the basis of legitimacy of birth as at least rather suspicious and, accordingly, demands greater precision in classification than required by the traditional rational relation standard. *Cf.* Note, *supra* note 7, at 1245-52 (test for *suspect* classifications

fected by the classification in *Jimenez* and the interest in special rehabilitative treatment involved in *Marshall* lack the constitutional imprimatur that the Court has said is the essential characteristic of fundamental interests.[50] Neither is explicitly or implicitly guaranteed. The Court may perceive a substantial measure of constitutional importance in the former interest and not in the latter, however, because subsistence relates to the enjoyment of fundamental interests in a way that special rehabilitative treatment does not.[51] As studies confirm,[52] people with inadequate food, clothing and shelter are less likely than those whose basic needs are met to devote their time and energies to exercising their first amendment freedoms of speech and petition. Though special rehabilitative treatment also bears some connection to vigorous and effective exercise of these political rights, the relationship is appreciably more remote.[53]

examines precision in classification but not weightiness of end served). It seems doubtful, however, that the measure of scrutiny exercised in *Jimenez* in fact was activated by the nature of the discriminatory basis, because the classification that the Court found defective was not based on legitimacy of birth, but rather was predicated on differences between groups of illegitimates. As the "we-they" theory of suspect classifications that Professor Ely first articulated in Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 YALE L.J. 920, 933 n.85 (1973) and more fully explained in Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 732-36 (1974), and that the author of this Article further developed in Note, *supra* note 7, at 1253-58, brings sharply into focus, the untrustworthiness that inheres in legitimacy classifications does not infect classifications of the latter sort. Legitimacy classifications are "we-they"—ones between a group of persons that constitutes a majority of the lawmaking body and another group that lacks significant representation in the legislature. Classifications based on differences between illegitimates, on the other hand, are "they-they"—ones between two groups, neither of which dominates the legislature. Unlike legitimacy classifications, then, the latter classifications are not suspect or at all untrustworthy for self-serving tendencies on the part of the lawmaker. (For a necessary refinement of the "we-they" approach, see Note, *supra* note 7, at 1254-58.) The point is not that the *Jimenez* Court did not have a "we-they" classification before it. Indeed, although the Court focused exclusively on a "they-they" classification, it did: legitimate children of disabled wage earners received the benefits that Congress denied to one group of illegitimates. Rather, the point is that the only reason that the Court had to scrutinize the classification that it in fact invalidated was its discriminatory effect.

50. The Court has expressly found these interests to be less than fundamental. Marshall v. United States, 414 U.S. 417, 421-22 (1974) (rehabilitative interest under review not fundamental); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (laws pertaining to "economics and social welfare" do not affect fundamental interests).

51. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting) ("The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.").

52. *See generally* A. KEYS, THE BIOLOGY OF HUMAN STARVATION (1950).

53. The Burger Court at times has appeared to recognize explicitly that people's interest in satisfying basic wants merits special solicitude in constitutional adjudication. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974) ("governmental privileges or benefits

B. *Magnitude of the Disadvantage*

The Warren Court's stated test for discriminatory effect makes the standard of review turn entirely on the fundamental or nonfundamental nature of the interest. It leaves no room for the Court to weigh the *extent* to which the state disadvantages some persons with respect to a particular interest.[54] Although the Burger Court broadly insists that it adheres to the Warren Court's approach, it has indicated expressly on at least two occasions that it does not always apply strict scrutiny to laws affecting fundamental interests, but rather takes relative disadvantage into account in determining the appropriate standard of review. In *Memorial Hospital v. Maricopa County*,[55] the Court rigorously reviewed Arizona's 1-year durational residence requirement for nonemergency medical care but only after first satisfying itself that the law had an unspecified minimum "amount of impact"[56] on the fundamental interest in interstate travel and migration. In *Rosario v. Rockefeller*,[57] the Court tested the validity of New York's primary enrollment law by something less exacting than strict scrutiny[58]

necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements"); Goldberg v. Kelly, 397 U.S. 254, 263-64, 265 (1970) ("It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But . . . when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process . . . . Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' ") (footnotes omitted). On other occasions, however, it has seemed to voice the contrary understanding. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 516 (1976) ("Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise [for purposes of allocating death benefits]."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("We recognize the dramatically real factual difference between the cited cases [involving business activities] and this one [involving people's basic needs], but we can find no basis for applying a different constitutional standard.").

54. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969), evidences that, despite its omission of a magnitude-of-disadvantage factor from its announced test, the Warren Court was not entirely insensitive to this consideration. Although the absentee ballot law before the *McDonald* Court discriminated with respect to voting, a fundamental interest, the Court applied a rational relation standard of review. It justified not using strict scrutiny by insisting that "[it is] not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.* at 807. The driving force of the opinion, however, may well have been a sense that the classification did not disadvantage the appellants as to voting *enough* to activate strict scrutiny. The analysis of *McDonald* in Part III defends its result along such lines. *See* text accompanying notes 110-12 *infra*.

55. 415 U.S. 250 (1974).

56. *Id.* at 256.

57. 410 U.S. 752 (1973).

58. *See id.* at 767 (Powell, J., dissenting) ("The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is 'not an arbitrary time limit unconnected to any important state goal'; that it is 'tied to a particularized

because in its view the law did not "absolutely"[59] deprive persons who failed to meet the law's registration deadline of their fundamental interest in voting.

Logical flaws in the Court's reasoning in *Maricopa County* and *Rosario*, however, make them less than fully persuasive authority for the present Court's incorporation of magnitude of disadvantage into its equal protection formula. *Maricopa County* is one of a line of equal protection decisions that the Court explained in terms of a discriminatory effect as to travel but that, as later demonstrated,[60] do not support such an analysis. The Court in *Rosario*, on the other hand, confused potential voters' ability to *avoid* the law's disenfranchising effect with the effect itself. Very simply, when the primary registration date set by the New York statute for the 1972 presidential primary passed, the petitioners in *Rosario* were no less "absolutely" prohibited from voting because they *could* have met the deadline without a great deal of effort. The disadvantage in terms of voting could not have been more extreme.[61]

Nevertheless, *Dandridge v. Williams*,[62] a case in which the Court never mentioned a magnitude-of-disadvantage factor, confirms its place in the Burger Court's thinking. In *Dandridge*, the Court held an aspect of Maryland's state plan under the federal Aid to Families with Dependent Children (AFDC) program to a rational relation standard despite the law's discrimination with respect to procreation, an interest that the Court already had denominated fundamental.[63] By specifying that welfare grants could not exceed approximately $250 per family per month, the regulation under review authorized payments sufficient to satisfy the subsistence needs only of families of six or fewer members. It therefore removed economic disincentives to procreation for indigent parents of families of fewer than six that it left standing for needy parents of larger families. The

legitimate purpose, and is in no sense invidious or arbitrary.' ") (footnotes omitted).

59. *Id.* at 757.

60. *See* text accompanying notes 170-76 *infra*.

61. For the implications of this contrary analysis of the magnitude of disadvantage in *Rosario*, see text accompanying notes 124-28 *infra*.

62. 397 U.S. 471 (1970).

63. Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (dicta). The author of this Article previously maintained that Buck v. Bell, 274 U.S. 200 (1927) and *Dandridge* indicate that *Skinner's* affirmation of fundamentality should not be taken literally and that the Court has treated procreation as an important, but not fundamental, interest. Simson, *supra* note 10, at 238-39. Upon further reflection, however, it appears that, although *Buck* apparently retains *some* vitality, *see* Roe v. Wade, 410 U.S. 113, 154 (1973) (citing *Buck* for the proposition that precedent does not support an absolute right "to do with one's body as one pleases"), the prior analysis gave the case greater credence than it deserves. In addition, the earlier assessment of the interest in procreation inadequately considered the possibility that the Court in *Dandridge* tacitly attended to the magnitude of disadvantage in deciding not to apply strict scrutiny.

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Court's failure in *Dandridge* to apply the strict scrutiny mandated by the fundamental interest doctrine is perhaps most easily understood in terms of an implicit determination by the Court that the classification disadvantaged the latter group of parents too insubstantially in terms of procreation to trigger application of so devastating a standard of review. Under this view, the Court proceeded on the tacit and not unreasonable premise that the availability or unavailability of funds adequate to satisfy a prospective child's minimum needs did not materially influence parents' decisions whether or not to have more children.[64]

C. *Nature of the State's Interest*

Under the Warren Court's bifurcated discriminatory effect test, the only material distinction between lawful state interests is the one between compelling and uncompelling interests. If the state treats people differently with respect to a fundamental interest, nothing less than a compelling interest suffices. In contrast, if the state treats people differently with respect to a lesser interest, any interest not proscribed by federal constitutional or statutory law serves as well as another to immunize the state action against a challenge to its discriminatory effect.[65] The Burger Court purports not to recognize any other distinctions. In practice, however, it occasionally has done so. *Department of Agriculture v. Moreno*[66] illustrates the present Court's unwillingness to treat all lawful but uncompelling state interests the same.

Moreno was a class action attacking a 1971 amendment to the federal Food Stamp Act of 1964.[67] The amended provision made any household with one member unrelated to any other ineligible to receive food stamps from the federal government. The Government contended in the Supreme Court that, by singling out households of this description for disadvantage, it rationally served its interest in preventing welfare fraud. Writing for the Court, Justice Brennan rejected this proposed justification for the classification. Under his analysis, the classification did not arguably work to minimize fraud, because "in practical operation [it] excludes from participation in the food stamp program *not* those persons who are 'likely to abuse the program,' but, rather, *only* those persons who are so desperately

64. Two of the dissenters in *Dandridge* readily conceded the point. 397 U.S. at 520 n.14 (Marshall, J., dissenting, joined by Brennan, J.) ("the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best"). Although the appellees argued to the Court an unconstitutionally discriminatory effect on procreation, *see id.*, the majority never addressed the issue.

65. For discussion and examples of unlawful objectives, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116 & n.109.

66. 413 U.S. 528 (1973).

67. *Id.* at 530 & n.2.

in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[68] *Moreno* thus appears to be one of those rare cases in which the Court has caught the lawmaker napping. Congress chose a means to implement its purpose that made shamefully little sense.

In fact, however, the classification in *Moreno* made considerable sense—simply not in terms of preventing fraud. It was a plausible means to promote the interest that, by all indications, was the one Congress actually had in mind when it passed the amendment: discouraging communal living. Though not extensive, the amendment's legislative history leaves little room to find that it was anything other than an attempt by Congress to deter people from adopting nontraditional lifestyles.[69] Furthermore, this inference from the legislative history is reinforced by the Government's decision in the 3-judge district court below to defend the provision on precisely this rectitude theme.[70]

Why, then, did the Court in *Moreno* pass over this interest as a possible justification for the law and focus entirely on the interest in eliminating spurious claims? A rather cryptic footnote in the Court's opinion seems to intimate that the Government's decision not to renew on appeal the morality argument along these lines that it raised unsuccessfully in the lower court absolved the Court of any responsibility to consider it.[71] Surely, however, if the Court believed that this once-litigated interest in fact legitimated the classification before it, it would not have passed it by. Historically, the Court has taken its task of reviewing the constitutionality of legislative acts—and perhaps in particular the acts of its coordinate legislative branch—with a seriousness that indicates that it did not make the instant law's fate turn on the Government's appellate strategy.[72] Something else almost certainly explains the Court's failure to pursue this potential justification and its attention instead only to the interest in circumventing fraud.

In light of the Court's apparent test for compelling state interests, a strong possibility is that the Court tacitly determined that, one, the fraud interest was substantial enough that, if implemented with a high degree of

68. *Id.* at 538.

69. *See* 116 CONG. REC. 44431 (1970) (An explanation by the Senate Committee on Agriculture and Forestry that the exclusion of unrelated households from the food stamp program is aimed at "hippy communes."); *id.* at 44439 (remarks of Senator Holland); H.R. CONF. REP. No. 1793, 91st Cong., 2d Sess. 8, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 6051, 6052-53.

70. Moreno v. Department of Agric., 345 F. Supp. 310, 314 (D.D.C. 1972) (3-judge court).

71. 413 U.S. at 535 n.7.

72. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

precision, it could have legitimated the amendment's discriminatory effect and, two, the underlying morality interest was too insubstantial to salvage the classification no matter how precisely served. The Court is yet to spell out its criterion for a compelling state interest. In characterizing certain interests as compelling, however, the Burger Court has appeared to decide compellingness by importance to the general welfare[73] or to governmental stability and effectiveness.[74] It seems likely, furthermore, that this criterion drawn from precedent is the one in fact used by the Court because it is probably the most logical one for it to be using: The state's obligation in a democratic republic to act with the people's best interests in mind and its need to protect its ability to function effectively in the people's behalf suggest that the Court should be gauging compellingness by a yardstick of this sort. If one assumes, then, that the *Moreno* Court was guided by the standard for compellingness that the Burger Court both appears and probably ought to be applying, the morality interest argued in the lower court was not simply not compelling. It was uncompelling in the extreme. Few things matter less to popular or institutional well-being than enforcing a moral precept that a significant and growing portion of the community does not share.[75] By contrast, the fraud interest also fell short of compellingness under the standard set forth above but not by nearly so much. Preserving the integrity of a program to feed society's hungry is important, even if not indispensable, to the commonweal.

D. *Relationship Between Means and End*

The Warren Court characterized the connection between the state's interest and the classification chosen to implement it as either irrational,

73. *See* Roe v. Wade, 410 U.S. 113, 162-63 (1973) ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' ") It should be noted that, although *Roe* discusses compelling state interests in a due process context, the Court in *Roe* appeared to indicate that it uses the same standard for compellingness in due process and equal protection cases. In announcing that the state's encroachment on a fundamental personal interest required justification by a compelling state interest, the Court cited Kramer v. Union Free School Dist., 395 U.S. 621 (1969) and Shapiro v. Thompson, 394 U.S. 618 (1969), two leading equal protection decisions. *See* 410 U.S. at 155.

74. *See* Storer v. Brown, 415 U.S. 724, 736 (1974) ("It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling . . . ."); Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972) ("An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.").

75. For intimations by the Court to similar effect, see Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

rational or necessary. With fundamental interests at issue, the Court insisted in theory on a necessary correlation; with nonfundamental interests, it demanded only a rational one. The Burger Court has not abandoned these categories expressly. Its decisions reveal a willingness, however, to explore gradations in the rational relationship sphere. In *Jimenez v. Weinberger*,[76] for example, it struck down as irrational a classification no more imprecise than the one it approved in *Marshall v. United States*.[77] The classification between two groups of afterborn illegitimates examined in *Jimenez* served the Government's interest in avoiding spurious welfare claims as well as the classification between two groups of addict offenders considered in *Marshall* served the Government's interest in screening out persons unlikely to be rehabilitated by special treatment. With a more important individual interest under review than in *Marshall*, however, the *Jimenez* Court set its sights on a more substantial nexus between means and end than the one it shortly before had deemed acceptable in *Marshall*. Not finding it, the Court invalidated the law.[78]

II. A Model for Decision

In line with recent developments in the Court's method of analyzing constitutionality in discriminatory effect, then, this Article proposes that courts first decide whether the individual interest affected by the classification before them is fundamental, significant or insignificant. Fundamental interests are those that the Constitution expressly protects and those that several provisions in the Constitution or the structure of government established by the Constitution imply enjoy a preferred position in the Republic.[79] Significant interests are ones that deserve a special measure of judicial solicitude because they contribute substantially to the enjoyment of fundamental interests or materially embody values more fully represented by fundamental interests.[80] The category of insignificant interests is reserved for those that relate minimally, if at all, to fundamental interests.[81]

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76. 417 U.S. 628 (1974).

77. 414 U.S. 417 (1974).

78. *See* text accompanying notes 35-53 *supra*. Under the proposed model, the Court in *Jimenez* should not have been willing to settle for less than a necessary connection between means and end. *See* text accompanying notes 203-06 *infra*. The Court's satisfaction with the better but not necessary connection in Mathews v. Lucas, 427 U.S. 495 (1976) (discussed note 204 *infra*), however, appears to render thoroughly implausible the facially dubious proposition that, in calling for a rational relationship with a nonfundamental interest at issue, *see* 417 U.S. at 636-37, the *Jimenez* Court actually was demanding not simply a firmly rational nexus but rather a necessary one.

79. *See* text accompanying notes 99-101, 132-35, 147-49, 168-69 *infra*.

80. *See* text accompanying notes 165-67, 188, 206 *infra*.

81. *See* text accompanying notes 212-16 *infra*.

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Second, courts should determine whether the disadvantage to the affected interest is total, significant or insignificant. Since interests are enjoyed in such a variety of ways, courts to some extent must develop criteria for relative disadvantage specific to the particular interests.[82] As a general matter, however, a state totally disadvantages some persons with respect to an interest when it allows or offers others an opportunity to enjoy the interest that is different in kind from the one allowed or offered them,[83] it significantly disadvantages some persons when it allows or offers others an opportunity to enjoy the interest that is materially greater than the one allowed or offered them,[84] and it insignificantly disadvantages some persons when the latter difference in degree is immaterial.[85]

Courts next should ascertain whether the interest informing the classification is compelling, significant, insignificant, or unlawful. Compelling interests are ones critical to the government's stability or effectiveness or otherwise vital to the general welfare.[86] Significant interests are ones important to institutional or popular well-being,[87] and insignificant interests are ones inconsequential to these ends.[88] Unlawful interests are ones prohibited by federal constitutional or statutory law.[89]

The final factor in the prescribed balance of discriminatory effect and governmental justification is the state's need to pursue its interest by the particular classification under review. Courts should determine the necessary, significant, insignificant, or nonexistent character of the relationship between means and end. The relative perfection of the classification provides an easily applied indicator of degree of necessity: A perfect classification indicates a necessary connection, a materially rational classification a significant connection,[90] a minimally rational classification an insignificant connection,[91] and an irrational classification a nonexistent

82. The analyses in Part III suggest such criteria. *See, e.g.*, text accompanying notes 138 & 209 *infra*.

83. *See, e.g.*, text accompanying notes 129-31, 150-58 *infra*.

84. *See, e.g.*, note 199 *infra*; text accompanying notes 102-07 *infra*.

85. *See, e.g.*, note 143 *infra*; text accompanying notes 110-12 *infra*.

86. *See, e.g.*, note 125 *infra*; text accompanying notes 120-23 *infra*.

87. *See, e.g.*, text accompanying notes 106, 189-92 *infra*.

88. *See, e.g.*, text accompanying notes 161-63, 165-67 *infra*.

89. *See* note 65 *supra*. Although the cases in Part III offer no example of a law demonstrated to rest on an illicit objective, the Court in one of those cases, Department of Agric. v. Moreno, 413 U.S. 528 (1973), did take note of an unlawful interest arguably explaining the classification under review. *See id.* at 534 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") On the burden of proving that an improper end motivated the lawmaker's decision, see Brest, *supra* note 65, at 130-31.

90. *See, e.g.*, text accompanying notes 190-92, 196 *infra*.

91. *See, e.g.*, text accompanying notes 199-201, 210-11 *infra*.

connection.[92] In using this indicator, however, reviewing courts must be mindful of one major limitation. It simply assumes that an imperfect classification is less than necessary because, theoretically, it can be made more precise. If less drastic means exist in theory but the state cannot improve upon the classification without grave consequences for its ability to function effectively, however, the classification is not less necessary to promote the state's interest than if no such alternative existed.[93] Courts therefore should complement their reference to this generally valid indicator by recognizing the necessity of imperfect classifications that the state establishes it feasibly cannot make more precise.

With the factors thus assembled, courts may then weigh discriminatory effect against the state's justification for the discrimination and arrive at a decision on constitutionality under the equal protection clause. They should compare the product representing discriminatory effect, *nature of the affected interest* x *magnitude of disadvantage*, with the product representing the state's justification, *nature of the state's interest* x *relationship between means and end*.[94] When the classification before the court either insignificantly disadvantages some persons or disadvantages them with respect to an insignificant interest, the discriminatory effect is negligible for equal protection purposes and the low standard of justification to which the Court traditionally has held the state in such instances applies. As long as the state's interest, however insignificant, is lawful and the classification bears some relationship, however insignificant, to the interest, the law stands. On the other hand, when the classification before the court more than insignificantly disadvantages some persons with respect to a significant or fundamental interest, the discriminatory effect has independent importance for purposes of equal protection review and a higher standard of justification applies. For the law to survive, the state's justification for the discrimination must equal or exceed the discriminatory effect. Thus, for example, when a classification *significant* to promote a *significant* state interest *significantly* disadvantages some persons with respect to a *fundamental* interest, it must be struck down. If, instead, a classification meets the latter description except that it is *necessary* to promote the state's interest, it withstands an equal protection attack attuned to discriminatory effect.[95]

92. The connection between classification and asserted state interest at least approximates nonexistence in two cases discussed. *See* text accompanying notes 150-58, 164 *infra*.

93. Although none of the classifications surveyed in Part III are perfect, one classification may be necessary to promote a lawful state interest. *See* note 121 *infra*.

94. For broad support for this type of balancing approach to equal protection problems, see Professor Brest's equation to describe the accommodation of competing interests in constitutional adjudication generally. P. BREST, CASES AND MATERIALS ON PROCESSES OF CONSTITUTIONAL DECISIONMAKING 988 (1975).

95. The various possibilities under the model may be summarized as follows with I and G denoting whether the individual challenging the law or the governmental body defending it prevails:

Presumably, the basis for preferring the state when the state's justification exceeds the discriminatory effect and for preferring the individual when the discriminatory effect exceeds the state's justification is reasonably clear. When one side outweighs the other in a balance, the interests represented by the weightier side prevail. The basis for preferring the state when, as in the second example offered, the two sides are in equipoise, however, may not be as evident. It seems, though, that if the state has as strong a case for singling out persons for disadvantage as those persons have for being free from such disadvantage, the decision whether or not to pursue the state's interest by the particular means is the type of policy decision that a state must be permitted to make. In agreeing that the state may disadvantage persons to any extent if necessary to promote a compelling state interest, the Warren Court conceded the validity of this proposition at the extreme. Its general validity is suggested here.[96]

GOVERNMENTAL JUSTIFICATION / DISCRIMINATORY EFFECT	Unlawful interest	Nonexistent relation	Insignificant interest x Any relation	Significant interest x Insignificant relation	Significant interest x Significant relation	Significant interest x Necessary relation	Compelling interest x Insignificant relation	Compelling interest x Significant relation	Compelling interest x Necessary relation
Insignificant interest x Any disadvantage	I	I	G	G	G	G	G	G	G
Significant interest x Insignificant disadvantage	I	I	G	G	G	G	G	G	G
Significant interest x Significant disadvantage	I	I	I	I	G	G	I	G	G
Significant interest x Total disadvantage	I	I	I	I	I	G	I	G	G
Fundamental interest x Insignificant disadvantage	I	I	G	G	G	G	G	G	G
Fundamental interest x Significant disadvantage	I	I	I	I	I	G	I	G	G
Fundamental interest x Total disadvantage	I	I	I	I	I	I	I	I	G

96. Particularly in light of the leeway in classification afforded by this deference in cases of equipoise, courts should be sensitive to the possibility that laws more than insignificantly disadvantaging people with respect to significant or fundamental interests may be constitutional in discriminatory effect but warrant invalidation on due process grounds. With serious individual harm at issue, the considerations of fundamental fairness informing the due process clause may require that the state bear the burden of providing a forum in which anyone in the class of persons that the law under review singles out for disadvantage can come forward with proof that the state

III. The Model's Implications for Warren and Burger Court Precedent

The proposed model deviates dramatically from the Warren Court's 2-tier approach and tracks the Burger Court's operative approach to an uncertain extent. Nevertheless, by adopting it expressly, the Court would cast doubt on the continued authority of few of its cases.[97] The Warren Court's decisions on discriminatory effect typically involved classifications that begged for invalidation under its bifurcated standard of review and do so no less under the more graduated approach proposed here. The Burger Court's discriminatory effect cases generally pose far closer questions of constitutionality under the model. The results that the Court reached in those cases, however, are almost always ones that reasonable applications of the model yield.[98]

A. *Fundamental Interests*

1. *Voting in state elections.*

The Constitution expressly guarantees voting in federal, but not in state, elections.[99] People's fundamental interest in voting in any elections that the state decides to hold, however, is implicit in the first amendment. Voting is the quintessence of political expression, and political expression comes within the core of values protected by the first amendment.[100] Having chosen to provide in the form of an election an avenue for this type of expression, the state discriminates with respect to first amendment freedoms when it allows some persons but not others access to the polls.[101]

interest furthered by the law is not promoted by disadvantaging him or her. Under these circumstances, until the state complements its classification with a means to mitigate the imprecision, it cannot constitutionally enjoy the cost savings that attend classifying imperfectly. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Department of Agric. v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring); Simson, *supra* note 10.

97. The selection of cases for Part III has been influenced significantly by Professor Gunther's emphasis on particular cases in G. GUNTHER, *supra* note 18, at 788-894.

98. The case analyses in Part III are organized by nature of the affected interest because the validity of none of the cases selected for discussion appeared to depend on making the apparently less reasonable of two defensible characterizations of this factor. This organization therefore should not be understood to imply that the characterization of an interest as fundamental or significant or as significant or insignificant may not be open to debate. This decision, like those made in typing the other factors in a particular case, does not flow mechanically from the guidelines provided by the model. *Cf.* note 166 *infra*; text accompanying notes 165-67 *infra* (plausible alternative characterizations of interest in deciding living arrangements).

99. U.S. CONST. art. I, § 2.

100. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

101. *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 & n.2 (1966) (strongly intimating viability of analysis along above lines). For analogous applications of the equal protec-

The Court's decision in 1964 in *Reynolds v. Sims*,[102] the historic one-person-one-vote case, to invalidate Alabama's apportionment scheme was an appropriate response in terms of the model[103] to inroads on this fundamental interest. The state's districting scheme, one unmodified since 1903,[104] produced gross disparities in voting power among eligible voters. In electing representatives to the two state houses, some persons' votes counted for far more than others'.[105] Many Alabamans thus rightfully could claim that the state, though allowing them the opportunity to cast a ballot, had disadvantaged them significantly with respect to the fundamental interest in voting by diluting seriously the potency of their votes. Alabama, in turn, could not show adequate justification for discriminating against them in this way, for the classification was neither necessary to serve a significant state interest nor significantly related to a compelling one. The state's interest in allowing its political subdivisions to represent their interests in the legislature was significant, but the apportionment scheme that yielded this disparity among the citizenry in voting power was obviously not the least drastic means of promoting it.[106] Moreover, its interest in the legislature's ability to run smoothly may well have been compelling, but retaining an apportionment scheme more than 60 years old was at best a minimally rational means by which to avoid the pitfalls of discontinuity.[107]

Two years later in *Harper v. Virginia Board of Elections*,[108] the Court struck down on equal protection grounds a provision of the Virginia Constitution that barred anyone from voting in a state election who had not paid a $1.50 poll tax in each of the 3 years preceding the election. In so doing, the Court again achieved a valid result.[109] Two state interests

tion clause to first amendment equal access problems, see Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536, 580-81 (1965) (Black, J., concurring).

102. 377 U.S. 533 (1964).

103. This qualification, "in terms of the model," will not be repeated in discussing the validity of the remaining cases in Part III. It should be understood, however, as implicit throughout.

104. 377 U.S. at 539-40.

105. "Under the existing provisions, applying 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the [Alabama] Senate, and only 25.7% lived in counties which could elect a majority of the members of the [Alabama] House of Representatives. Population-variance ratios of up to about 40-to-1 existed in the Senate, and up to about 16-to-1 in the House." *Id.* at 545.

106. *See id.* at 580-81.

107. *See id.* at 583-84.

108. 383 U.S. 663 (1966).

109. Carrington v. Rash, 380 U.S. 89 (1965), handed down in the interim between *Reynolds* and *Harper*, marks another occasion on which an equal protection attack properly prevailed. The Texas Constitution totally disadvantaged as to voting military personnel who moved to Texas as part of their duties. It did not allow them to vote in state elections during the period of their military service. The classification was not necessary, however, to serve a compelling state interest. One interest that it furthered—limiting elections to bona fide residents—could lay claim

explained the passage of this provision totally disadvantaging some people in terms of their fundamental interest in voting. One, the interest in an informed electorate, ranked as compelling because the effective operation of state government depends in large measure on the caliber of those selected by the people to govern, which in turn depends in large measure on the extent to which the people cast knowledgeable votes. The classification, however, did not bear the necessary nexus to this compelling state interest required to justify its discriminatory effect. As a means to weed out voters who felt so little stake in the outcome of state elections that they would not have taken the time to inform themselves adequately on the candidates and issues, the classification was grossly under- and overinclusive. Some people who cared little about state politics but who easily could part with $1.50 each year probably paid the tax; many others interested in such matters but in dire economic straits probably did not. The importance of the second state interest implicated in *Harper*, one in raising revenue, depended upon the extent to which the funds generated by the law helped maintain the government's structural integrity and its ability to make necessary provision for the general welfare. Since the funds accruing from the poll tax were almost certainly not crucial in these regards, Virginia's revenue-oriented interest in this taxation scheme was in all probability less than compelling. Moreover, even assuming that the interest was compelling, the classification was not necessary to serve it. Virginia had available to it a host of alternative fundraising devices that would have encroached upon its citizens' constitutional interests less severely than the one before the Court. On this score as well, then, the constitutional provision reasonably could not have been sustained.

In *McDonald v. Board of Election Commissioners*,[110] a case decided in Chief Justice Warren's final term, the Court upheld Illinois' failure to provide persons incarcerated in their county jail pending trial with absentee ballots. If the inmates had proved that they had no other means of voting than by absentee ballot, the law logically could not have been

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to compelling stature. It was vital to the stability and effectiveness of state government to weed out would-be voters who, lacking a personal stake in the outcome of the election, were not motivated to vote responsibly. (Alternatively, Texas may have had a compelling interest in ensuring bona fide residence by virtue of the mention of in-state residence in § 2 of the 14th amendment. *See generally* Note, *supra* note 7, at 1255-56 n.77.) The law under review failed to promote this interest, however, with the degree of necessity requisite for it to withstand judicial scrutiny. It denied the franchise to some residents who in fact intended to make Texas their home. Rather than disadvantage all military personnel by presuming for reasons of economy that none of them were bona fide residents, Texas could have afforded them the same type of hearing that it provided members of various other in-state groups whose intentions to settle in Texas were subject to some doubt. *See* 380 U.S. at 95-96.

110. 394 U.S. 802 (1969).

approved. The statute served Illinois' compelling interest in circumventing electoral fraud by removing the possibility that the jail authorities, some of whom were elected officials, might attempt to use their positions of power over the inmates to sway the inmates' votes in local elections.[111] The classification lacked the necessary relationship to this interest, however, essential to justify totally disadvantaging the inmates relative to recipients of absentee ballots with respect to their ability to vote. It was underinclusive because it made absentee ballots available to people who, unprotected by the privacy of the voting booth, might succumb to improper pressures on their vote. Even more obviously, it was overinclusive because it denied absentee ballots to persons who would not yield to corrupt efforts to influence their vote or who never would be exposed to dishonest tactics of this sort.

The inmates did *not* demonstrate, however, that alternative means of voting were not in fact readily available to them. The state was perhaps all the while prepared to provide guarded transportation to the polls or supervise election sites at the jail if only the inmates had asked it to do so.[112] On the record before the Court, then, the absentee ballot law may have inconvenienced the inmates, but it did not affect significantly their ability to vote. Under this set of facts, Illinois' at least rational explanation for the classification sufficed.

Shortly after *McDonald* and in the last weeks of the 1968 Term, the Court struck down in *Kramer v. Union Free School District*[113] a section of New York's education code that disenfranchised, for purposes of school district elections, people who at the time of the election neither owned or leased real property in the district nor had children attending any district school. The law met a fitting demise.[114] Its discriminatory effect, a total disadvantage with respect to a fundamental interest, far outweighed the state's justification for enacting it. The law promoted New York's compelling interest in securing voters who felt enough of a stake in the outcome to do the research and thinking essential to an informed choice at election

111. *See id.* at 810.

112. *Id.* at 807-08 & n.6.

113. 395 U.S. 621 (1969).

114. In a companion case to *Kramer*, Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam), the Court no less appropriately invalidated Louisiana legislation that restricted voting in municipalities' revenue bond elections to property taxpayers. As in *Kramer*, the discriminatory effect was constitutionally extreme and the state could not demonstrate that the classification was necessary to promote its compelling interest in an informed electorate. Louisiana's legislation, moreover, was tailored even less closely to this interest than was New York's. Since the revenue bonds did not depend on property taxes for financing but instead used profits from public utilities that the bond proceeds helped fund, people's status as property taxpayers basically was irrelevant to their sense of involvement in the bond elections and, thus, to the likelihood that they would cast intelligent ballots. *See id.* at 705.

time, but it was patently under- and overinclusive. On the one hand, someone who neither owned or leased real property in the district nor had children in a district school might well have had a genuine interest in the formulation of local policies in an area as central to the well-being of the community and the nation as the education of the young. On the other hand, someone who satisfied either or both of these criteria might have been thoroughly uninterested in such matters.[115]

Gordon v. Lance[116] raised a problem concerning limited purpose elections not implicated in *Kramer*: When the state decides to submit an issue to the people, must it abide by the will of the majority? The Court, then in its second Term of Chief Justice Burger's leadership, responded in the negative and, in terms of a discriminatory effect as to voting, rightly so. In *Gordon* West Virginia residents who had voted in countywide referenda in favor of a school bond issue and additional taxes challenged the validity of state constitutional and statutory requirements that prohibited West Virginia's political subdivisions from issuing bonds or increasing tax rates unless authorized to do so by a 60 percent majority of those voting in a referendum. The plaintiffs had mustered simple majorities for their positions at the polls, but not the necessary 60 percent. Before the Court they maintained that the 60 percent requirement impermissibly discriminated against them with regard to their fundamental interest in voting by weighting the votes of persons opposing the bond issue and the tax increase more heavily than it did those of people supporting these innovations. In fact, however, they suffered no discrimination with respect to voting at all. Their votes counted as much as anyone else's in deciding the questions that the state referred back to the people[117]—whether or not to override for immediate purposes state policies against particular fundraising measures.[118] The state could have placed these means to generate income off limits entirely to its political subdivisions. Instead, in the form of the disputed referendum mechanism, it left local government units some option in this regard but not an altogether free one. In so doing, it did not run afoul of the Constitution except to the extent that provisions other than

115. *See* 395 U.S. at 632 & n.15.

116. 403 U.S. 1 (1971).

117. The plaintiffs convinced the West Virginia Supreme Court that they had experienced a dilution of voting power akin to the one suffered by the plaintiffs in *Reynolds v. Sims*, *see* text accompanying notes 102-07 *supra*. Lance v. Board of Education, 153 W. Va. 559, 572-73, 170 S.E.2d 783, 790-91 (1969). The analogy to *Reynolds*, however, was highly superficial. The voters who sought relief in *Reynolds* had less say in general elections than voters from other districts because their votes went to elect a smaller proportion of the state's decisionmaking bodies. The plaintiffs in *Gordon*, on the other hand, had the same say in the local referenda as anyone else.

118. On the basis for these policies, see 403 U.S. at 6-7; Note, *Extraordinary Majority Requirements and the Equal Protection Clause*, 70 COLUM. L. REV. 486, 499 (1970).

the equal protection clause may require that state elections be decided by the will of the majority.[119]

The Court's subsequent decision in *Dunn v. Blumstein*[120] to reject Tennessee's defense of its 1-year in-state and 3-month in-county residence requirements was equally unimpeachable.[121] These requirements demanded extraordinary justification by the state because they totally disadvantaged some people with regard to a fundamental interest. Though related to two compelling state interests, the classifications between long- and short-term residents were not necessary to further those interests. First of all, by disenfranchising persons who, by election time, would not have lived in Tennessee for a year and in the county in which they wished to vote for 3 months, Tennessee promoted its compelling interest in an informed electorate. The length of time that people live in a state or county says something about the probability that they will vote in an intelligent way

119. The *Gordon* Court rejected this possibility with emphasis on the Constitution's several allowances for minority rule. 403 U.S. at 6.

120. 405 U.S. 330 (1972).

121. The challenge in Marston v. Lewis, 410 U.S. 679 (1973) (per curiam), to Arizona's 50-day residence requirement posed a much closer question than the one resolved by *Dunn* a year earlier. The Court reasonably could have invalidated this requirement as well, but it did not err in instead sustaining it. Arizona's law functionally duplicated Tennessee's in two respects. First, it totally disadvantaged some persons regarding a fundamental interest and therefore had to fall unless necessary to a compelling state interest. Second, it served the state's compelling interests in excluding incompetent voters and identifying bona fide residents, but did so too imprecisely to satisfy constitutional constraints. Unlike Tennessee's residence requirement, however, Arizona's was related closely to the state's compelling interest in taking appropriate administrative measures to ensure accurate voter lists. By making ineligible to vote anyone not able to claim bona fide residence in Arizona 50 days prior to the election, the residence requirement worked in tandem with the state's 50-day registration deadline to allow state election officials an opportunity to corroborate information offered to prove bona fide residence and to take precautions against dual registration and other forms of voting fraud.

A strong argument can be made that 50 days were not necessary to complete these crucial administrative tasks. In 1970 Congress required states to conform to a 30-day registration deadline for presidential elections. 42 U.S.C. § 1973aa-1(d) (1970). It expressly found that a lengthier period "does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections." *Id.* § 1973aa-1(a)(6). If more than 30 days is not necessary for presidential elections, then 30 days should suffice to accomplish the identical tasks performed in preparing for state elections. *See* 410 U.S. at 682-85 (Marshall, J., dissenting).

A finding that Arizona in fact needed an extra 20 days to complete its registration process satisfactorily, however, is not implausible in light of the extraordinary burdens that the state's volunteer registrar system and its practice of holding primaries in the fall imposed on the county recorders. In the period immediately preceding the election, the recorders were forced to divide their time between registration and the primaries. Furthermore, the work of the state's nonprofessional registrars was unusually time consuming to review. *See id.* at 680-81. To be sure, Arizona might have alleviated these burdens by training less error-prone volunteers (or hiring professionals) and increasing the personnel in the recorders' office during primary season, *see id.* at 683 (Marshall, J., dissenting). The repercussions for Arizona of implementing these adaptive measures, however, may have been sufficiently serious that the extra 20 days reasonably could be characterized as a practical necessity.

because it influences their familiarity with local issues. People's individual interests and abilities, however, say much more. Some persons are more competent to vote in local elections after living in a state for 1 day than others are after living there for 20 years. As a means to exclude voters too ignorant of the candidates and issues to render a reasonably well-considered judgment on them, then, a 1-year or 3-month residence requirement was hopelessly crude.[122] Second, by insisting that people must reside in-state for 1 year and in-county for 3 months before voting in Tennessee, the state furthered its compelling interest in limiting the franchise to bona fide residents. The residence requirements provided a criterion by which intent to remain indefinitely in the state and county could be measured. As an indicator of an intent to remain, however, the law was demonstrably imperfect. Many persons living in Tennessee for less than 1 year or, for that matter, less than 3 months fully intend to make it their home, whereas many living in the state for longer periods of time do not. The state's registration system offered an obvious less drastic alternative by which to pursue this end.[123]

The Court's approval in 1973 in *Rosario v. Rockefeller*[124] of New York's primary registration deadline lacks even arguable validity.[125] By statute New York required voters who wished to vote in the primary election of a

122. *See* 405 U.S. at 356-58.

123. *See id.* at 346.

124. 410 U.S. 752 (1973).

125. Also indefensible was the Court's rejection the prior day in Salyer Land Co. v. Tulare Lake Basin Storage Dist., 410 U.S. 719 (1973), of a challenge to a limited purpose election system. The California Water Storage District Act, CAL. WATER CODE §§ 39000-48401 (West 1966), authorized water storage districts to plan and implement projects for "the acquisition, appropriation, diversion, storage, conservation and distribution of water." *Id.* § 42200. The Act left each district's management to a board of directors elected by the district's landowners. *Id.* § 41000. The landowners' votes in the district election were weighted according to the value of their land with each $100 worth of land buying one vote. *Id.* § 41001. The statutory scheme therefore disenfranchised district residents who owned no land and diluted the votes of all but the largest landowner. Both disadvantaged groups argued a denial of equal protection to the Court.

Since the California law totally disadvantaged the nonlandowning residents as to their fundamental interest in voting, it was invalid unless necessary to promote a compelling state interest. The classification was related to two compelling state interests but not with the requisite precision. First, it served California's compelling interest in satisfying its citizens' various water-related needs by attracting landowner support for the organization of the water district. As the majority in *Salyer* explained, "[t]he California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district would not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control." 410 U.S. at 731. Even the Justices in *Salyer* who voted to uphold the law, however, in effect conceded that a necessary nexus did not exist by their elaborate attempt to establish that strict scrutiny did not apply in this context. *See id.* at 726-30.

Second, the classification promoted the state's compelling interest in securing an informed electorate, but it was demonstrably underinclusive. It failed to give the nonlandowners' stake in the election's outcome its due. In general, landowners probably were more interested in the type

particular party to enroll as members of the party 30 days prior to the general election that preceded the primary. In enforcing this deadline, the state denied Rosario and others who had not enrolled in a party by 30 days before the 1971 general election the opportunity to vote in the presidential primary of June 1972.

By totally disadvantaging these would-be voters, the state to some extent promoted its compelling interest in the integrity of the election process. The deadline upon which disenfranchisement turned discouraged persons faithful to one party from registering in another party's primary for the purpose of helping to nominate the candidate who, in their estimation, would be most likely to lose to their party's candidate in the general election. Since people are unlikely to know months in advance of a primary that their vote is not needed to help nominate a candidate of their choice in their party's primary, an enrollment date well before the primary itself deters party "raiding" of this sort. Moreover, since people politically-minded enough to contemplate raiding perhaps become too engrossed in their party's success in a forthcoming general election to think seriously about the best strategy for the next one, an enrollment date with a general election between it and the primary may have particular advantages in this regard.[126]

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of decisions made by the water district board than nonlandowners. Indeed, perhaps *all* landowners were more interested in such matters than *all* nonlandowners. *See id.* at 728. But even assuming that this were so, California constitutionally could not disenfranchise the nonlandowners unless they were personally *so* untouched by water district decisions that they reasonably could not be expected to cast an intelligent vote. And, very simply, they were not. The district's flood control policies vitally affected anyone who resided in the district. *See id.* at 737-38 (Douglas, J., dissenting). Furthermore, those district residents who farmed land that they leased, rather than owned, experienced the benefits of the district's irrigation projects and directly (by paying the district the amount that it assessed the lessor for the project) or indirectly (by paying the lessor a rental price that compensated the lessor for bearing the assessment) shared in their costs.

Apportioning votes by land value was no more defensible under the equal protection clause. By allotting at the time of suit 37,825 votes to the largest landowner in the Tulare Lake Basin District, *id.* at 733, this scheme disadvantaged all other landowners in the district in terms of their fundamental interest in voting and the smaller ones quite substantially. To the extent that this classification promoted the state's compelling interest in knowledgeable voting, it did so without the significant nexus that its discriminatory effect demanded. It was at best a minimally rational means to secure an intelligent collective decision about the district's needs. Since the district assessed the costs of its projects against landowners roughly in proportion to the value of their land, large landowners generally may have had somewhat more incentive than small landowners to study district projects and may have cast more informed ballots as a result. The inference from size of investment to probable aptitude for voting was tenuous, however, most obviously because it entirely overlooked the individual landowners' capacities to pay their assessments. Their stake in a decision turned not so much on how much it would cost them as on how much it would cost them *relative* to how much they could afford. As an attempt to scale voting power to knowledgeableness about district needs, the apportionment scheme thus made only marginal sense.

126. *See* 410 U.S. at 760-61.

The requisite necessary correlation between the deadline and the state's compelling interest in minimizing this species of election fraud, however, almost certainly did not exist. The New York law may well have thwarted party raiding with a great deal of success, but it also needlessly penalized many persons who commit the eminently forgivable and predictable error of forgetting about a deadline for participating in an event that is 8 or sometimes even 11 months away. For several reasons, a 1- or 2-month deadline could be expected to achieve approximately the same results for the state while rescuing many individuals from inadvertently falling victim to disenfranchisement.[127] First of all, wherever the deadline is set, raiding is not a serious threat unless a large-scale effort is made to organize it. On their own, the overwhelming majority of people do not think in such terms. They may take the time to vote in a primary but not to weigh the strategic possibilities. Second, if an organized effort to raid does materialize, it is unlikely to gain momentum until the primary date draws near. Not until then are voters likely to be in a position to feel that their votes are cast more profitably to help nominate a loser for another party than a person whom they would like to see win for theirs. Finally, the state can supplement the shorter deadline with other deterrents to raiding such as criminal sanctions, restrictive party affiliation rules that parties may adopt at their option, an earlier deadline for those desiring to change parties from the last primary, and disenrollment procedures triggered by a challenge to a purported raider's good faith in enrolling.[128]

With two major differences, *O'Brien v. Skinner*[129] in 1974 was *McDonald* revisited.[130] The inmates ineligible for absentee ballots supplemented their attack on state law with proof that the state would not provide them with another route to the ballot box, and the inmates prevailed. The first difference required the second. Since the record before the Court in *O'Brien* showed a total disadvantage as to voting, the classification had to be necessary to a compelling state interest rather than merely rational. An absentee ballot classification that leaves inmates incarcerated in their county jail pending trial without any means of voting, however, is too imperfect to meet so rigorous a standard of review.[131]

127. *See id.* at 771 (Powell, J., dissenting).

128. *Cf. id.* at 771 n.13 (Powell, J. dissenting) (summarizing alternative means cited by petitioners to Court). At the time of *Rosario*, New York law provided for the described disenrollment procedures. *Id.* at 762 n.10.

129. 414 U.S. 524 (1974).

130. *See* text accompanying notes 110-12 *supra*.

131. In a subsequent decision, Richardson v. Ramirez, 418 U.S. 24 (1974), the Court approved California's constitutional and statutory provisions that prohibited persons convicted of a felony from voting. The result may seem indefensible because the state cannot demonstrate that this extreme discriminatory effect is necessary to promote a compelling state interest. By exclud-

2. *Freedom from the consequences of conviction.*

As a matter of due process, the state must ensure that all defendants in criminal cases have ready access to certain means of defense essential for a criminal prosecution to be a fair confrontation between the individual and the state.[132] The assistance of a lawyer at the "critical stages" of the trial, for example, is guaranteed.[133] By allowing defendants to utilize resources beyond those fundamental to fair proceedings, the state may obligate itself under the equal protection clause to make additional means of defense available to those too poor to purchase them. A system of justice that permits the wealthy a greater opportunity to defend themselves disadvantages the poor with respect to an interest that the fifth and sixth amendments' various protections for the accused[134] imply is as fundamental as interests come: freedom from the harsh consequences, direct and collateral, that attend a criminal conviction.[135]

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ing from the electorate people who might be expected to vote with an intent to injure rather than help the state, California furthers its compelling interest in shielding the election process from improper influences. The gross imprecision of this classification indicates, however, that it is an unnecessary, if not irrational, means to promote the latter interest. The percentage of ex-felons who would vote with motives of this malicious sort is probably not materially greater—if indeed at all greater—than the percentage of the general population that would do so. Both percentages, moreover, are no doubt miniscule. *Ramirez* was correctly decided, however, if one accepts as valid the *Ramirez* Court's argument, *id.* at 41-55, that § 2 of the 14th amendment, which expressly permits states to disenfranchise felons without suffering reduced representation in Congress, U.S. CONST. amend. XIV, § 2, creates an exception to the guarantee in § 1 of equal protection of the laws. Under this reasoning, *Ramirez* did not involve an unconstitutionally discriminatory effect because it was not a case in which the discriminatory effect test of § 1 applied. For the contrary view on the scope of § 2 and a collection of supporting authorities, see 418 U.S. at 73-74 (Marshall, J., dissenting).

132. On the extent to which the due process clause of the 14th amendment has been held to incorporate the Bill of Rights' guarantees (ones addressed, according to the Marshall Court, to the federal government alone, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833)), see G. GUNTHER, *supra* note 18, at 532-46.

133. *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967); Gilbert v. California, 388 U.S. 263, 269-74 (1967).

134. These include indictment, the bar on double jeopardy, freedom from compulsory self-incrimination, and the ingredients of due process (among them, the reasonable doubt standard, *In re* Winship, 397 U.S. 358 (1970)), U.S. CONST. amend. V, as well as a speedy and public trial, an impartial jury, trial in the vicinage, confrontation of one's accusers, compulsory process and assistance of counsel, U.S. CONST. amend. VI.

135. The Court has neither singled out this interest as fundamental nor indicated that it runs through the line of cases discussed in this section. Instead, the Court has decided these cases on the theory, first expounded by Justice Black in Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion), that the equal protection and due process guarantees broadly combine to require that rich and poor defendants enjoy essentially similar opportunities to defend. In isolating this interest as the driving force of *Griffin* and its progeny, this Article therefore purports to clarify a central but as yet only vaguely articulated ingredient in the Court's reasoning in these cases. Mayer v. City of Chicago, 404 U.S. 189 (1971), an extension of *Griffin's* free transcript requirement to an indigent defendant charged with an offense punishable only by fine, explains

In *Griffin v. Illinois*,[136] an early Warren Court decision, the Court demonstrated a solicitude for this interest that, under the circumstances, it deserved. The Court struck down an Illinois law requiring persons convicted of noncapital crimes who desired a transcript of their trial for use on appeal to purchase it themselves. Due to a combination of factors, this law had the practical effect of providing defendants who had adequate funds to purchase a transcript with an appeal broader in scope than the one available to indigent defendants. First, Illinois' appellate courts were required by statute to limit their review in criminal cases to questions involving the federal or state constitution unless the defendant furnished a bill of exceptions or a certified report of the trial. Second, without a transcript, a defendant often could not prepare this bill of exceptions or certified report.[137] If a total disadvantage occurs in this context when one defendant enjoys a constitutionally adequate opportunity to defend and another does not, Griffin was not totally disadvantaged by the Illinois law, because, under existing precedent, he was denied none of the constitutional ingredients of an adequate defense: The Court had long since held that the process due criminal defendants as a matter of fairness in the balance of advantage between the prosecution and the accused does not include an appeal.[138] Nonetheless, Griffin was not less than significantly disadvantaged, because Illinois' system of criminal justice left him materially less able than persons of greater means to protect himself from incurring criminal penalties. They could appeal alleged evidentiary errors, and he could not. Since Illinois obviously could have funded free transcripts for indigents without burdening seriously its ability to govern effectively, the economizing interest served by the law was not compelling. Moreover, since the state had available to it innumerable less drastic means of ensuring the availability of sufficient revenue to carry out essential functions, this law was not necessary as a money-saving device. Illinois' strictly monetary justification for its law was therefore no match in the equal

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the perception that the interest informing *Griffin* and subsequent decisions based on *Griffin* encompasses more than freedom from possible imprisonment. On the fundamentality of the latter interest, compare U.S. CONST. art. I, § 9, cl. 2 (habeas corpus) with U.S. CONST. amend. IV (search and seizure of person). *Cf.* Williams v. Illinois, 399 U.S. 235 (1970) (equal protection prohibits imprisonment beyond maximum term allowed by statute of defendant financially unable to pay fine).

136. 351 U.S. 12 (1956). Although there was no majority opinion in *Griffin*, the two opinions written by the 5-member majority that invalidated the law under review both drew upon the equal protection clause. *See id.* at 17-19 (plurality opinion); *id.* at 25 (Frankfurter, J., concurring).

137. *Id.* at 13-14 (plurality opinion).

138. McKane v. Durston, 153 U.S. 684 (1894), *cited with approval in* Ross v. Moffitt, 417 U.S. 600, 606 (1974).

protection balance for the discriminatory effect that it perpetrated.

Douglas v. California[139] in 1963 involved a law that discriminated against some indigent defendants by circumscribing the quality of their appeal rather than its scope. As in *Griffin*, the Court found that the law violated the equal protection clause and here, too, its conclusion was eminently defensible. Under a California rule of criminal procedure, when an indigent defendant requested counsel on appeal, the appellate court reviewed the trial record and appointed counsel if it determined that a lawyer might be of any assistance to the defendant or the court. An indigent denied appointed counsel retained the option to appeal pro se. Under these circumstances, however, not having a lawyer to prepare and argue one's case was much the same as not having any opportunity to appeal at all. Any error committed at trial that was sufficiently obvious that a layman might notice it almost certainly was caught by the appellate court in its review of the record and made the basis for an appointment of counsel. Indigents for whom counsel was not appointed were thus precisely those most in need of counsel, for a lawyer's expertise in spotting subtleties that might provide grounds for reversal represented these indigents' only hope. By denying them free counsel, then, California deprived them of the appeal enjoyed by others no less categorically than if it had written the proscription expressly into law.[140] As in *Griffin*, since the law affected a part of the process not essential to a constitutionally adequate defense, it did not totally disadvantage anyone as to freedom from conviction.[141] Again, however, the disadvantage to some persons was surely significant. Moreover, also as in *Griffin*, the state could offer as support for its classification only a fiscal interest that was at most significant and a nexus between means and end that ranked as no better.

More than a decade after *Douglas*, the Burger Court in *Ross v. Moffitt*[142] agreed that North Carolina did not have to provide counsel for indigents petitioning its supreme court or the federal Supreme Court for discretionary review. Although the Court more reasonably would have reached the opposite result, its conclusion was defensible. The case turns on the magnitude of the disadvantage.[143] If the state had appointed counsel to

139. 372 U.S. 353 (1963).

140. *See id.* at 358.

141. *See* note 138 *supra* and accompanying text.

142. 417 U.S. 600 (1974).

143. The soundness of the Burger Court's earlier approval in Britt v. North Carolina, 404 U.S. 226 (1971), of a North Carolina court's denial of an indigent defendant's motion for a free transcript of his mistrial for use in preparing for a second trial rests on a less questionable assessment of magnitude of disadvantage. A transcript of this sort generally could be expected to make a substantial difference in a defendant's ability to make a successful defense. It would be helpful in preparing for the second trial and in impeaching the credibility of adverse witnesses at that trial. *See id.* at 232 & n.4 (Douglas, J., dissenting). In *Britt*, however, the indigent

assist Moffitt in preparing his petitions to the North Carolina Supreme Court and the United States Supreme Court, he undoubtedly would have had a better chance of getting those courts to review his forgery convictions. Indeed, petitioning for certiorari may be such an art that the aid of counsel was the difference between some chance of getting review and virtually no chance at all.[144] Two considerations that figured prominently in the *Ross* Court's opinion lend support to the thesis, however, that lack of representation had little to do with Moffitt's inability to secure discretionary review.[145] First, Moffitt *was* able to offer the state and federal high courts a lawyer's detailed account of the possible bases for reversal in his case. He had the brief used in his appeal of right from the trial. Second, the factors that would have influenced these courts to grant Moffitt review—for example, the degree of public interest in the case, the importance of the legal issues implicated and the presence of a probable conflict with their prior decisions—were the type that these courts reasonably might have been expected to discern without the aid of counsel. Under this narrow but not implausible view of the utility of counsel in petitioning for discretionary review, Moffitt was insignificantly disadvantaged in terms of avoiding criminal penalties, and the state's rational economizing justification was adequate for the classification to survive.[146]

3. *Self-determination*.

The fundamentality of people's interest in being free from governmental interference in making decisions that vitally affect the direction and tenor of their private lives is implicit in various guarantees of the Bill of Rights. The first amendment, for example, presupposes a citizenry autonomous to this degree. Freedoms of speech, association[147] and petition

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defendant's inability to procure a transcript of the prior proceeding did not materially disadvantage him relative to wealthier defendants because he had access to a rough functional equivalent of a transcript. Since the two trials were only a month apart, the petitioner and his lawyer no doubt could remember much of what a free transcript would provide. In addition, at any time after the mistrial, the two of them could have filled in any gray areas in their recollection of it by asking the court reporter to read back his notes. As was apparently common knowledge among the local bar in the small town in which Britt was tried, the court reporter regularly complied with such informal requests. *Id.* at 228-29. Under these circumstances, North Carolina's rational, fiscal justification for not making available a transcript to persons in Britt's particular situation established the constitutionality of the state court's act under the equal protection clause.

144. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797-99 (1961).

145. 417 U.S. at 614-17.

146. On the constitutionality of discrimination between defendants deriving from the decisionmaking process itself, see Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 518-19 (1976).

147. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

offer little protection against irresponsible government unless people have the free spirit and sense of self that come from making crucial personal decisions.[148] The third amendment's restrictions on quartering troops in the home, the fourth amendment's limitations on searches and seizures, and the fifth amendment's privilege against compulsory self-incrimination express a commitment to human dignity and a concern about government insinuating itself too deeply into people's private affairs that similarly imply a constitutional preserve of this dimension for free choice.[149]

Of the various decisions that shape the course and character of one's existence, none do so more dramatically than the one whether or not to bear children.[150] In *Skinner v. Oklahoma*,[151] a 1942 preview of 2-tier review[152] authored by later Warren Court mainstay William O. Douglas,[153] the Court acknowledged the "fundamental"[154] importance of the decision to procreate, announced the need for "strict scrutiny"[155] and reached a result that gave this fundamental interest its due. The Court invalidated an Oklahoma statute that provided for sterilizing people convicted of three or more felonies involving "moral turpitude." Skinner came within the legislatively disadvantaged class by reason of his two convictions for robbery and one for stealing chickens. Although 3-time embezzlers were guilty of acts virtually identical in effect to the property offenses for which Skinner was convicted, they were not subject to sterilization.[156] The Oklahoma legislature had specified that embezzlement was not the type of crime to which the law was addressed.[157]

By denying Skinner any freedom to decide whether or not to bear children while leaving habitual embezzlers free to decide this critical matter as they pleased, Oklahoma would have totally disadvantaged Skinner with respect to the fundamental interest in self-determination.

148. *Cf.* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas . . . . [I]n the context of this case . . . that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

149. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (enumeration of constitutionally grounded "penumbral rights of 'privacy and repose' ").

150. *See* note 63 *supra*.

151. 316 U.S. 535 (1942).

152. Though a pre-Warren Court decision, *Skinner* is discussed because its novel approach later figured so importantly in the Warren Court's adoption of 2-tier review. *See* Karst, *supra* note 5, at 732-37.

153. On Justice Douglas' contribution to the Warren Court's development of equal protection doctrine, see Karst, *supra* note 5.

154. 316 U.S. at 541.

155. *Id.*

156. *See id.* at 538-39.

157. *Id.* at 537.

Moreover, it lacked a justification for the classification that even approximated the one required by this grievous discriminatory effect. The state's interest in protecting its residents from unlawful deprivations of property was compelling. The nexus between the classification and this interest, however, was far from necessary. On the one hand, the statute's prescribed sterilization of 3-time robbers was frighteningly overinclusive because there was no established ineluctable link between these persons' criminal activity and similar antisocial behavior on the part of their offspring. On the other hand, the statute's exception for embezzlers was indeterminably underinclusive because the uninheritability of 3-time embezzlers' criminal tendencies was no more firmly grounded in scientific fact.[158]

The Court's approval in 1970 in *Dandridge v. Williams*[159] of a maximum grant AFDC regulation's discriminatory effect as to procreation relies for its validity on an estimate of magnitude of disadvantage that is at least arguably too conservative but defensible nonetheless. Maryland lacked impressive support for disadvantaging parents of families of six or more members with respect to their fundamental interest in procreation. The classification between parents of these and smaller families was basically a reasonable means of limiting expenditures. If, as the Court tacitly and not implausibly assumed,[160] however, the grant ceiling only insignificantly disadvantaged parents of large families, the state needed no more persuasive a justification.

The Court's opposite reaction two years later in *Eisenstadt v. Baird*[161] to a Massachusetts statute prohibiting distribution of contraceptives to single persons to prevent pregnancy comports with a sound assessment of the competing interests. The statute significantly disadvantaged unmarried persons relative to married ones with regard to procreation by making it substantially more difficult for them to effectuate a decision not to bear children. The prevalent social mores in 1972 indicate that one interest informing the classification, deterring premarital sex, was too unimportant to the general welfare to validate the discriminatory effect.[162] Indeed, Massachusetts' overall approach to the distribution of contraceptives effectively conceded its insignificance, for the state allowed married persons to

158. *See id.* at 541-42.

159. 397 U.S. 471 (1970).

160. *See* text accompanying notes 62-64 *supra*.

161. 405 U.S. 438 (1972).

162. Is the state's interest in proscribing homosexual acts between consenting adults in private any weightier? *Cf.* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (3-judge court), *aff'd mem.*, 425 U.S. 901 (1976) (lower court's dismissal of challenge to Virginia sodomy law affirmed). For opposing views on the government's interest in punishing behavior of this sort specifically and in enforcing morals generally, compare P. DEVLIN, THE ENFORCEMENT OF MORALS (1965) with H. HART, LAW, LIBERTY, AND MORALITY (1963).

acquire contraceptives regardless of whether or not they planned to use them with their spouse and made contraceptives available to unmarried persons to prevent the spread of disease.[163] Nor was the classification defensible in terms of the state's interest in protecting the community's health. Although the latter interest was no doubt compelling, the nexus between means and end approached and perhaps achieved the irrational. If the state was acting on the assumption that contraceptives are dangerous, then it should have denied them to married and unmarried persons alike. Similarly, if it proceeded on the supposition that its doctors were not competent to decide when unmarried persons could use contraceptives safely, then it should have prohibited distribution, by prescription or otherwise, to married persons as well. It had no firm basis for believing that its physicians' competence to prescribe contraceptives was any greater for married persons than for unmarried ones.[164]

Decisions about the composition of one's household may not be as important to one's life as decisions about bearing children. If not fundamental, however, the interest in deciding living arrangements is not less than significant because it materially embodies the value of self-determination that finds full expression in the interest in procreation. The Court's dissatisfaction in 1973 in *Department of Agriculture v. Moreno*[165] with an amendment to the Food Stamp Act is valid under either characterization of the interest's importance.[166] By denying food stamps to persons in households with any unrelated members, Congress significantly disadvantaged people who wished to adopt a nontraditional lifestyle. The Act made it enormously easier for those who aspired to conventional living arrangements to follow through on their decision about desirable housemates. Furthermore, neither the United States' moral interest in discouraging communal living nor its fiscal interest in circumventing welfare fraud could legitimate this discriminatory effect. The former interest was

163. *See* 405 U.S. at 448-49.

164. *See id.* at 450-51.

165. 413 U.S. 528 (1973).

166. Though subject to debate, the Court's acquiescence the following year in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), to a discriminatory effect with respect to this same interest was reasonable. As in *Moreno*, the validity of the result does not seem to depend on whether the interest in deciding living arrangements is characterized as fundamental or significant. It turns on the magnitude of the disadvantage. By local ordinance, the 700-person community of Belle Terre permitted only 1-family dwellings and defined "family" to exclude households of more than 2 persons with any unrelated members. Since, on the record before the Court, people who wished to live communally were free to form nontraditional households elsewhere in the vicinity, the ordinance arguably disadvantaged them only insignificantly. *But cf.* Appeal of Girsh, 437 Pa. 237, 244-46, 263 A.2d 395, 398-99 (1970) (individual communities to some degree obligated to permit diversity). Under this by no means indisputable estimate of magnitude of disadvantage, the morality interest that proved inadequate in *Moreno* seems

insignificant and the classification served the latter, admittedly significant interest, with at best a bare minimum of rationality.[167]

4. *Interstate travel and migration.*

An individual's interest in moving freely from state to state is not specifically mentioned in the Constitution. No single provision in the text nor any few read together, furthermore, offer a persuasive basis for inferring that it is fundamental. Its lofty place in the constitutional scheme, however, is implicit in the structure of the federal system for which the framers provided.[168] Though composed of 50 states diverse in many respects, the United States is above all a union of these states—a nation. Moreover, as members of a nation, the people of the United States have a fundamental interest in deciding free from state interference through which parts of the country they wish to travel and where they want to reside.[169]

In 1969, the Warren Court in *Shapiro v. Thompson*[170] announced the fundamentality of this interest and found that 1-year durational residence requirements for state welfare unlawfully discriminated with respect to it. Relying on *Shapiro* and citing a discriminatory effect on travel, the Burger Court in *Dunn v. Blumstein*[171] and *Memorial Hospital v. Maricopa County*[172] subsequently struck down similar requirements for voting and free nonemergency medical care respectively. Although the *Shapiro* Court correctly identified travel as fundamental, it erroneously applied this perception, and *Dunn* and *Maricopa County* simply perpetuated its mistake.

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sufficient support for the classification litigated in *Belle Terre*. Alternatively, the ordinance was sustainable as an at least minimally rational means to ensure a pleasant and healthful environment for the village's citizens. It kept down population density in the village and thereby helped avoid the traffic, noise, parking and other problems that beset congested areas. *See* 416 U.S. at 9. Of course, limiting the size of any household, related or unrelated, would have served this interest as well. A preference in this regard for households bound by blood, adoption or marriage is understandable, however, in terms of a secondary interest in avoiding disruption of more enduring relationships.

167. *See* text accompanying notes 67-75 *supra*.

168. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 27-29 (1969).

169. *Cf.* Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969): "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement . . . .

"We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." (footnote omitted).

170. 394 U.S. 618 (1969).

171. 405 U.S. 330 (1972).

172. 415 U.S. 250 (1974).

Basically, the plaintiffs in the three cases, all recent arrivals denied some benefit that the state might have chosen to withhold from everyone,[173] suffered *no* discrimination with respect to travel. Although the laws under review classified on the basis of recent interstate travel, they did not, as the Court assumed, disadvantage new arrivals relative to long-term residents as to their decision to migrate interstate: If long-term residents exercised their interest in resettling outside the state, it denied them these benefits no less categorically than it did recent arrivals—and, indeed, even more so, for it cut off the benefits indeterminately rather than for only a year. Nor did the states in fixing these waiting periods disadvantage one group of new arrivals relative to another as to this decision: They denied these benefits to new arrivals one and all.[174]

To be sure, if the Court in *Shapiro* and *Maricopa County* was acting on the assumption that the constitutional interest in travel implies an obligation on the part of the states to remove economic impediments to immigration rather than simply not erect any,[175] these laws disadvantaged poor recent arrivals relative to wealthier ones as to travel. By all indications, however, the Court had nothing of the sort in mind. The latter assumption clashes with another held firmly by the Court: that states are free to decide for themselves whether or not to extend welfare and the like to their own citizens.[176] Together, the two premises would produce the thoroughly anomalous constitutional propositions that, one, a state disadvantages indigents with respect to travel by failing to award them benefits that they may not have been receiving in the state from which they migrated and,

173. The premise that the state is not obligated to hold elections or offer welfare underlies the Court's decision of voting and welfare claims under the equal protection clause. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973); Dandridge v. Williams, 397 U.S. 471, 525 (1970) (Marshall, J., dissenting); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195, 202 (1976).

174. The Court's summary affirmance in Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.) (3-judge court), *aff'd mem.*, 400 U.S. 884 (1970), involved invalidation of a durational residence requirement of an entirely different variety—one that sanctioned the actual deportation of some persons. Under Arizona law, the superintendent of a state mental hospital could return to their state of prior residence persons committed to the hospital who had migrated to the state within the past year. The Court in *Vaughan* therefore had before it a clear instance of a state discriminating against one group of recent arrivals with respect to their interest in remaining in-state. Arizona simply did not *permit* certain mentally disturbed individuals to stay. The case harks back to the classic right-to-travel case, Edwards v. California, 314 U.S. 160 (1941), in which the Court struck down (under the commerce clause, U.S. CONST. art. I, § 8, cl. 3) a California statute imposing criminal penalties on anyone who "brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person." 314 U.S. at 171.

175. The *Griffin-Douglas* line of cases, *see* text accompanying notes 132-46 *supra*, might be thought to suggest this interpretation. *See also* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

176. *See* note 173 *supra*.

two, a state may opt against a welfare or free medical care system for its citizens but *must* administer such systems for needy new arrivals. As to *Dunn*, its result is inexplicable even under this dubious characterization of the constitutional interest in travel, and no alternative line of defense in terms of travel is apparent.

Nevertheless, though analytically confused in terms of a discriminatory effect regarding travel, *Shapiro* and the Court's two other invocations of this interest to strike down state laws do not pose material hurdles to adopting the proposed model. Instead of overruling these cases, the Court can justify their results by drawing upon either of two other equal protection grounds. First, the Court can disclaim the travel analysis entirely and reconstruct the cases strictly in terms of discriminatory effects as to significant interests in the benefits denied. The *Dunn* Court, for example, cited a discriminatory effect on voting as an alternative ground for invalidating Tennessee's 1-year waiting period to vote,[177] and its disapproval of the law is defensible on that score.[178] Furthermore, although the Court did not alternatively predicate its decisions in *Shapiro* and *Maricopa County* on impermissible discriminatory effects as to an interest in subsistence, it reasonably might have done so. The 1-year waiting periods for welfare benefits and free nonemergency medical care under review in *Shapiro* and *Maricopa County* respectively totally[179] disadvantaged recent arrivals with respect to their significant[180] interest in basic means of sustenance, and the states in both instances offered fiscal rationales inadequate to justify discriminations of this severity.[181]

Second, rather than concede that an emphasis on travel has no place in

177. 405 U.S. at 335.

178. *See* text accompanying notes 120-23 *supra*.

179. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court rejected an attack on Iowa's 1-year waiting period for access to local divorce courts because "the gravamen of appellant Sosna's claim is not total deprivation . . . but only delay." *Id.* at 410. Since the challenge was based on Boddie v. Connecticut, 401 U.S. 371 (1971), and its due process rationale for striking down filing fee requirements for getting a divorce, the Court spoke of a less than total "deprivation," rather than "disadvantage." Presumably, however, if the law's effect on recent arrivals' interest in securing a divorce had been questioned on equal protection grounds (as was its effect on travel, *see* note 187 *infra*), the Court would have said that the *disadvantage* was not total. In the divorce context, an estimate of magnitude of disadvantage that discounts for a future interest in the immediately unavailable benefit may make sense. *But see* Sosna v. Iowa, 419 U.S. 393, 421-22 (1975) (Marshall, J., dissenting). It is doubtful, however, that one can reasonably say by analogy that the plaintiffs in *Dunn*, *Shapiro* and *Maricopa County* were less than totally disadvantaged as to voting and means of subsistence because they would be eligible to vote and receive welfare and free medical care in a year. Those disadvantaged in *Dunn* were forever foreclosed from voting in the elections held during their first year of residence in-state and the prospect in *Shapiro* and *Maricopa County* of food and health care in a year was little, if any, solace to people in desperate need of these basics before the waiting period expired.

180. *See* text accompanying note 188 *infra*.

181. *See* 415 U.S. at 263-69; 394 U.S. at 627-38.

equal protection analysis, the Court can explain its rigorous review in the *Shapiro* line of cases by reworking its travel theme into a discriminatory *basis* approach. It can invoke either of two theories to establish that classifications based on recent interstate travel are constitutionally suspect.[182] Under one theory, these classifications are suspect because they share the essential characteristic of the paradigmatic suspect classifications of race,[183] nationality[184] and alienage:[185] They distinguish between one group of persons, long-term residents, who comprise a majority of the lawmaking body and another group, recent arrivals, with little, if any, representation in the legislature and only meager input by more indirect means into decisions that classify to their disadvantage.[186] This theory attaches overriding importance, therefore, to the fact that, as a result of their short tenure in the state, recent arrivals may be adversely affected by classifications that they had virtually no voice in making. Under the second, more conventional theory, classification by recent interstate travel is suspect because it is inconsistent with the concept of nationhood central to the Constitution. The federal system itself implies that classifications that relegate recent migrants from a sister state to second-class citizenship and emphasize their foreignness are strongly disfavored.[187]

B. *Significant Interests*

1. *Basic necessities.*

Although an individual's interest in satisfying elementary survival

182. A third theory suggested by some courts and commentators finds authority for the suspectness of classification by recent interstate travel in precedent that indicates that classifications discriminating on the basis of past exercise of first amendment rights are suspect. *See, e.g.*, Cole v. Housing Auth., 435 F.2d 807, 810 n.9 (1st Cir. 1970); Linde, *supra* note 173, at 202. Classification by recent interstate travel is functionally different, however, from classification by participation in protected first amendment activities. It lacks the penalty element and accompanying chilling effect that make the latter an appropriate focus for rigorous judicial scrutiny. In classifying by recent migration for purposes of allocating certain benefits, the state treats new arrivals no worse than it did before they exercised their constitutional right to travel: It conferred no benefits on them before they traveled, and it confers none on them after. Moreover, if the Court assumes that this fundamental interest requires states not to interfere with individual decisions to travel interstate but imposes no affirmative obligation on them to facilitate travel, *see* text accompanying notes 175-76 *supra*, a state does not penalize travel in a constitutionally cognizable manner when it fails to extend benefits to recent arrivals that it makes available to long-term residents.

183. Bolling v. Sharpe, 347 U.S. 497 (1954).

184. Hirabayashi v. United States, 320 U.S. 81 (1943).

185. Graham v. Richardson, 403 U.S. 365 (1971).

186. *See* Note, *supra* note 7, at 1245-58. *See also* note 49 *supra*.

187. The Court in Sosna v. Iowa, 419 U.S. 393 (1975), was correct in rejecting the right-to-travel attack on Iowa's 1-year durational residence requirement for access to local divorce courts. Like the laws in *Shapiro*, *Dunn* and *Maricopa County*, the one in *Sosna* did not discriminate with respect to travel. By adopting the suggested discriminatory *basis* analysis, however, the

needs lacks the constitutional nexus upon which fundamentality depends, it does occupy a station of intermediate constitutional importance. Access to adequate food, clothing, shelter, and the like in large part determines one's capacity to enjoy in substance the political freedoms that the framers expressly guaranteed.[188]

In upholding Maryland's AFDC maximum grant regulation, the Court in *Dandridge v. Williams*[189] allowed Maryland no greater leeway in discriminating with respect to this interest in necessities than it deserved. The welfare ceiling significantly disadvantaged AFDC families with more than six members relative to smaller families receiving such aid: The subsistence needs of the latter class of families were satisfied, but those of the former class were left materially unmet. On the other hand, by setting the maximum grant at roughly the amount earned by a head of household working full-time at the minimum wage,[190] the state accommodated reasonably well several significant governmental interests: assisting persons unable to take care of their crucial wants; economizing substantially on matters that it deemed less important to the commonweal than others; and maintaining good will both between the people and their government and between different sectors of society. This last-named interest—more specifically, one in not antagonizing large working families that had difficulty acquiring necessities for themselves in adequate supply[191]—established a sufficiently firm foundation for not allocating limited funds strictly according to the number of persons in eligible families.[192] The welfare ceiling may not have been necessary to minimize unhealthy political and social frictions, but it was significant in that regard.

The following year in *James v. Valtierra*[193] the Court sustained a California law making the construction of low-rent housing projects, but

Court would cast doubt upon the validity of the result in *Sosna*. The Iowa law probably could not withstand exacting review. *See id.* at 424-27 (Marshall, J., dissenting).

188. *Cf.* Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 ("[G]overnmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) ("Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment.") (footnote omitted).

189. 397 U.S. 471 (1970), *discussed in* text accompanying notes 62-64, 159-60 *supra*.

190. 397 U.S. at 486 & n.19.

191. Presumably, the state's decision to satisfy fully the subsistence needs of small welfare families did not unconstitutionally discriminate against large self-supporting families unable to meet their needs entirely. The family's traditional place in American society as an economic unit reasonably could be thought to vindicate this classification inherent in the Maryland plan.

192. This argument was broadly invoked by the Court, *see* 397 U.S. at 486, and articulated at greater length and disputed by Justice Marshall in his dissent, *see id.* at 524-25 & n.20 (Marshall, J., dissenting).

193. 402 U.S. 137 (1971).

not other housing projects, subject to approval by voters in local referenda. Although this decision may be wrong under a discriminatory basis analysis,[194] the California law did not demand invalidation for its discriminatory effect. The statute significantly disadvantaged indigents with respect to their significant interest in adequate shelter. They alone had to subject their demands for public housing to possible veto by the people of the community. To the extent, moreover, that the potency of this veto power might be doubted in the abstract, the referendum requirement already had proved in practice to be far from a mere formality.[195] The state, however, at least arguably significantly promoted a significant state interest. Allowing people to decide directly matters of major importance to their community was surely a significant state interest. Furthermore, since low-rent housing projects generally may have drawn on local funds more than other types of housing projects, the classification was precise enough to justify its discriminatory effect. Federal grants and loans *did* make low-rent housing by far the cheapest for localities to construct. Over the long run, however, low-rent housing typically may have proved a greater expense for the community than other types of public housing because the rentals had to be kept considerably lower than those needed to offset the costs of maintaining and servicing the projects.[196]

In 1972 the Court in *Lindsey v. Normet*[197] rendered judgment on another equal protection challenge to a state's housing policies. The appellants attacked Oregon's "forcible entry and wrongful detainer" (FED) statute, which afforded landlords judicial procedures for evicting tenants who failed to pay their rent within 10 days of its due date. The Court sustained one section of the statute that provided for trial of the landlord's suit for possession of the premises within 6 days of the time that the complaint was served unless the tenant posted security for rent to cover the period of a continuance. The majority also upheld provisions that implicitly excluded as a defense to an FED action the landlord's failure to maintain the premises.[198] The Court, however, struck down the law's requirement that tenants who wished to appeal an adverse lower court

194. *See* 402 U.S. at 144-45 (Marshall, J., dissenting) (emphasizing the challenged provision's express classification between rich and poor, and distinguishing de jure from de facto wealth classifications for purposes of suspect classification treatment).

195. At the time that the 3-judge court below delivered its opinion striking down the law, almost half of the low-rent housing referenda that local government units had held had gone against the poor. Valtierra v. Housing Auth., 313 F. Supp. 1, 3 (N.D. Cal. 1970).

196. *See* 402 U.S. at 143 & n.4.

197. 405 U.S. 56 (1972).

198. Under these provisions, tenants could prevail only by proving that, at the time of suit, they were legally entitled to possession, not in physical possession or not forcibly withholding the premises. *Id.* at 69.

decision must post bond for twice the amount of the rent likely to accrue pending decision of the appeal.

The Court correctly found that the trial-related provisions did not unconstitutionally discriminate against the appellants as to adequate housing, because these sections of the statute did not in the least disadvantage them in this respect. By accelerating the time of trial and requiring tenants to litigate in separate actions, if at all, any claims against the landlord for breaches of express and implied covenants in the landlord-tenant agreement, Oregon plainly *affected* the appellants' interest in decent shelter. On the record before the Court, however, it did not *discriminate* against the appellants with regard to this significant interest: It treated all persons precisely the same. By allowing a continuance only to persons who posted security for rent that would become due, Oregon may have disadvantaged poor tenants relative to ones more well-to-do, but the appellants never argued the unconstitutionality of the FED scheme in the latter regard. Furthermore, if, by implementing these provisions, the state treated tenants any worse with respect to adequate housing than it treated persons who lived in premises that they did not rent, the appellants failed to explain how.

The Court's invalidation of the statute's double-bond requirement was also sound.[199] In contrast to the other provisions reviewed, this one *did* discriminate against the appellants with regard to their interest in adequate shelter. In operation, it inevitably disadvantaged tenants too poor to post the double bond relative to those wealthy enough to do so as to their capacity to protect their housing interests in the courts. Furthermore,

199. Several months after handing down *Lindsey v. Normet*, the Court reached a more debatable result in Jefferson v. Hackney, 406 U.S. 535 (1972). The court upheld Texas' system of administering federally assisted welfare programs over the objection that it unlawfully discriminated against AFDC recipients. Texas significantly disadvantaged people receiving AFDC awards relative to those receiving state funds under Old Age Assistance (OAA), Aid to the Blind (AB) and Aid for the Permanently and Totally Disabled (APTD) with respect to their significant interest in subsistence. Its welfare payments to members of the respective classes differed materially: The state funded 50% of AFDC recipients' calculated needs at the time that the suit was first brought and 75% by the time that the Court decided *Jefferson*, and it funded throughout the life of the litigation 100% of OAA recipients' calculated needs and 95% of AB and APTD recipients' calculated needs. Since, on the whole, children may be better able than the aged, blind and disabled to tolerate the burdens of living without their basic needs fully met, *see id.* at 549, this classification to some extent served the state's significant interest in preferring those of its residents most in need of state assistance. In light of the devastating effects that inadequate subsistence during childhood may produce later in life, *see* S. Doc. No. 208, 80th Cong., 2d Sess. 105 (1950), the comparative generalization upon which this classification rested arguably was not accurate enough to justify its discriminatory effect. Though not irrational, the classification reasonably could be characterized as no better than marginally rational. A more generous characterization of the nexus between means and end, however, is not so implausible that the result in *Jefferson* cannot validly rest upon it.

since an appeal might well rescue a tenant from the eviction ordered by the lower court, the disadvantage in this regard experienced by those without sufficient funds to post the double bond was significant. Oregon, on the other hand, had an interest of undeniable importance to the general welfare that the double bond to some extent served—expediting the resolution of disputes that the parties are apt to try to terminate in their favor by force.[200] The wealth classification created by the provision's economic impediment to appeal, however, bore too imprecise a nexus to this significant interest to justify its sizable discriminatory effect. It was marginally rational at best. The classification was perhaps only moderately underinclusive: Forfeiture of the bond was probably a sufficiently strong disincentive to frivolous appeals that few persons who could post the double bond did so for reasons of harassment or delay. The overinclusiveness of the wealth classification, however, was extreme: Indigents whose defenses to the FED action were not the least bit frivolous essentially were prohibited from renewing them on appeal.[201]

The Court's subsequent invalidations of acts of Congress in *Department of Agriculture v. Moreno*[202] and *Jimenez v. Weinberger*[203] derive firm support from the laws' severe discriminatory effects as to subsistence.[204] By exclud-

200. *See* 405 U.S. at 70.

201. *See id.* at 78.

202. 413 U.S. 528 (1973).

203. 417 U.S. 628 (1974).

204. In Mathews v. Lucas, 427 U.S. 495 (1976), the Court approved a classification much like the one that it invalidated earlier in *Jimenez*. This one, too, deserved to fall, and the Court erred in holding otherwise. The provisions of the Social Security Act under review in *Lucas* categorically awarded survivor's benefits upon a wage-earner parent's death to legitimate children and to illegitimate children bearing one or another of several characteristics, *see id.* at 499, that tend to show dependency on the decedent at the time of death. It withheld such benefits, on the other hand, from illegitimate children not included in the latter group unless they could demonstrate at an administrative hearing actual dependency at the time of death. By allowing an opportunity to rebut the presumption of nondependency felt to arise from a child's illegitimacy and lack of any of the specified dependency-indicating characteristics, Congress to some extent avoided the overinclusiveness in weeding out spurious claims that it built into the classification reviewed in *Jimenez*. Unless one assumes, however, that all actually dependent children presumed nondependent by the Act can prove their dependency, Congress did not avoid entirely the overinclusiveness witnessed in *Jimenez*. Particularly in light of the difficulties of proving dependency with the wage-earner parent not available to testify, moreover, it would be highly unrealistic to so assume. Like the classification in *Jimenez*, then, the one in *Lucas* totally disadvantaged some illegitimates as to subsistence and, accordingly, was constitutional only if necessary to further the Government's significant fiscal interest in it. Any claim that this classification bears a necessary nexus to economic ends, however, is patently belied by an underinclusiveness as great as the one that beset the classification in *Jimenez*. Many of the children presumed dependent by the Act are undoubtedly not dependent upon the insured wage earner at the time of death. *See* 427 U.S. at 517 (Stevens, J., dissenting). In not requiring individualized determinations of these children's entitlement to monies set aside to replace support lost with a wage earner's death, Congress therefore created a classification that the Court ought to have found fatally imperfect.

ing members of households with unrelated persons from participation in the food stamp program and by declaring certain afterborn illegitimates ineligible for social security benefits, Congress totally disadvantaged individuals with regard to basic necessities. The Government's justification for the food stamp policies reviewed in *Moreno* legitimated a total disadvantage as to this significant interest no better than it has been seen to ratify a significant disadvantage as to the fundamental interest in procreation. The United States' justification for the social security allocation litigated in *Jimenez* also was deficient, because the classification no more than insignificantly promoted a significant state interest. As a barely rational means of circumventing spurious claims, it was a decidedly weak reed upon which to rest so devastating a discriminatory effect.[205]

2. *Education*.

The Constitution neither expressly nor implicitly recognizes that a state has any obligation to educate its residents. Individuals have a significant constitutional interest in receiving an education, however, because the knowledge and skills acquired substantially condition enjoyment of the fundamental interests of speech, petition and voting.[206]

In approving Texas' method of school financing, the Burger Court in *San Antonio Independent School District v. Rodriguez*[207] opted for the more debatable of two defensible responses to the discriminatory effect as to education under review. Texas, like most states, finances public education through state and local funds along with a comparatively small amount of federal aid. As is typical in systems of this sort, state law restricts to a tax on real estate property in the district the means by which local school districts can supplement state-provided educational funds. At the time of suit, this financing scheme produced considerable variation among Texas' districts in expenditures per pupil according to their taxable real property wealth. By taxing real estate at roughly the same rates as existed in property-rich districts, Texas' poorer districts had available far less revenue than its wealthier ones to spend per pupil.[208]

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205. *See* text accompanying notes 37-39, 43-44, 49-53, 76-78, 165-67 *supra*.

206. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 112-15 (1973) (Marshall, J., dissenting). *Cf.* Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship.").

207. 411 U.S. 1 (1973).

208. *Id.* at 11-15.

Despite much uncertainty about the best way to educate children with even unlimited resources at hand, it seems perfectly reasonable to assume that, under Texas' system, children in wealthy districts received an education superior to the one enjoyed by children in poorer districts. Nonetheless, the disadvantage experienced by the latter group of children was at least arguably less than significant. The record before the Court permitted the inference that the existing system did not turn out graduates from the poorer districts typically materially less competent than ones from wealthier districts to exercise intelligently their fundamental political rights: Texas claimed that it allocated enough *state* funds to provide all schoolchildren in the state with an education that equipped them to enjoy meaningfully these basic freedoms, and the appellees did not prove that the education in fact afforded in poor districts fell short of this minimum level of excellence.[209]

This classification between children living in poor and wealthy school districts, however, may have been too imprecise to support even the slightest discriminatory effect. According to Texas, these variations in expenditures per pupil were justified because the system of dual financing of which they were a product served the state's lawful interest in enhancing local control over decisions about the education of the district's children. On the one hand, communities that wished to give their children a better education than the minimally adequate one made available by state funding alone could raise revenue for the purpose by a real property tax. On the other hand, communities content to give their children an education no better than the one financed by the state were not obligated to pay for it. As a means of vesting greater local control in school districts, however, Texas' system of school financing with its partial dependence upon a local property tax made little sense. The option given to school districts to spend substantially more on public education than allocated by the state was not practically or legally available to the poorer districts in the state. To supplement state funding per pupil to the extent that some wealthy districts did, they would have had to raise their tax rates to levels not only grossly unfair to property owners in the district but also well above those allowed by state law.[210] Nevertheless, property-based financing probably does not make *so* little sense in terms of local control that the Texas system of funding public education reasonably cannot be thought to yield a classification with the minimal rationality needed to support an insignificant disadvantage.[211]

209. *See id.* at 24, 36-37.
210. *See id.* at 64-67 (White, J., dissenting).
211. *See id.* at 50-55.

C. *Insignificant Interests*

The wide variety of interests lacking constitutional significance is suggested by the obvious dissimilarity between the interests examined in two Burger Court decisions of recent years. In *Marshall v. United States*,[212] the 2-prior-felonies exclusion under review discriminated among addict offenders with respect to their interest in being considered for special rehabilitative treatment.[213] In *New Orleans v. Dukes*,[214] a grandfather clause to an ordinance barring vendors from the French Quarter of New Orleans discriminated between long- and short-term local vendors as to their interest in conducting their business in a particular place. The Constitution neither explicitly nor implicitly recognizes the fundamentality of these disparate interests. Nor do these interests bear the substantial connection to a fundamental interest that characterizes significant interests. Receiving special rehabilitative treatment to some extent conditions the exercise of fundamental political freedoms. It does so immaterially, however, relative to the influence exerted in this regard by the enjoyment of such nonfundamental interests as subsistence and education.[215] By the same token, deciding free from governmental interference one's place of business is related to the fundamental interest in self-determination. The impact of this decision on the course and quality of one's life is marginal, however, in comparison to the effect of decisions such as whether or not to marry or have children.[216]

The validity of the Court's approval of the classifications in *Marshall* and *Dukes* follows easily from this characterization of the affected interests. With an insignificant interest at issue, any relationship between the classification and a lawful interest will do. Moreover, however meager the justification in each case may have been for the law's discriminatory effect, it satisfied that distinctively toothless test. The 2-prior-felonies exclusion in *Marshall* did not draw an entirely arbitrary line for purposes of the Government's interest in weeding out persons not likely to be helped by the special treatment offered. Addict offenders with no prior felonies on their record, or only one, typically may be better candidates for rehabilitation than those with two or more prior felonies.[217] In *Dukes*, New Orleans' broad ban on vendors served its fiscal interest in ensuring that the French

212. 414 U.S. 417 (1974).

213. *See* text accompanying notes 40-41 *supra*.

214. 427 U.S. 297 (1976) (per curiam). *Dukes* expressly overruled Morey v. Doud, 354 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds," 427 U.S. at 306.

215. *See* text accompanying notes 49-53, 188, 206 *supra*.

216. *See* text accompanying notes 147-50 *supra*.

217. On the tenuousness of the nexus, see text accompanying notes 45-49 *supra*.

Quarter retains the charm that makes it a tourist attraction. The city's special dispensation for vendors operating in the French Quarter for 8 or more years reasonably may have been thought to further its interest in minimizing the economic repercussions of its preservation effort. Vendors plying their trade in one place for 8 or more years generally may find it more difficult to adapt to new surroundings than ones working in the locale for a shorter period of time. In addition, by rescuing veteran pushcart peddlers from the ban,[218] the city to some degree may have promoted its interest in preserving the French Quarter's income-generating beauty. The latter class of vendors typically may incorporate, or at least may appear to tourists to incorporate, the historic charm of the French Quarter more fully than relatively recent arrivals on the scene.[219]

IV. Persistent Problems

As emphasized throughout this Article, the proposed model is prescriptive in part but also has a definite descriptive, precedent-conscious orientation. It attempts to define what the Court should do within boundaries set by what the Court has done. As a result, it need not and does not resolve certain problems that a purely prescriptive model would have to address. Among the problems bypassed on this basis, however, are two so central to the validity of the approach upon which the model builds that it seems desirable to offer a brief explanation of why the Court's answers to them, though disputable, are at least reasonable.

First, the Court's constitutional authority to scrutinize classifications more or less carefully according to the gravity of the discriminatory effect is open to debate. Since the Court has proceeded under the view that constitutional authority of the sort described indeed exists, the model so assumes. It may be argued, however, that nothing in the history of the 14th amendment supports the line of analysis initiated by the fundamental interest doctrine. From this perspective, the draftsmen's immediate concern with preventing unfair treatment of blacks underlines that the focus of the equal protection clause is who is being hurt rather than how much. A court may be right, therefore, as discriminatory *basis* analysis assumes,[220] to intensify its standard of review in response to certain characteristics of the persons in the legislatively disadvantaged class. It makes no sense, however, to use the equal protection clause to differentiate among types of harm experienced. If there is any weighing of interests to be done, the due

218. The beneficiaries of the exemption numbered two. One sold ice cream and the other hot dogs, and both had worked in the French Quarter for over 20 years. 427 U.S. at 300.

219. *See id.* at 305.

220. *See* text accompanying note 7 *supra* & text following note 8 *supra*.

process clause provides the sole authority for the task, and it directs an inquiry into the lawfulness of governmental actions that gauges the magnitude of the injury suffered by the plaintiffs without regard to the state's better or worse treatment of persons not before the court.[221]

The credibility and considerable force of these objections cannot be denied. They hardly establish, however, that the Court erred in perceiving that discriminatory effect is a discrete type of harm that the Constitution addresses. The principle of equality embedded in the language of the 14th amendment impressively supports the Court's sensitivity to discriminatory effect. It demands increasingly intense scrutiny of the state's actions as the state treats people more unequally. The more serious the harm that the state selectively visits on some, the greater the justification that this precept of equal treatment would seem to obligate the state to offer for its actions.[222]

Second, the appropriate criterion for fundamentality is not clear. Since the Court has not only said that it uses express or implicit mention in the Constitution as the measure of fundamentality but in fact has voted interests in or out of the fundamental circle in a manner consistent with its actually having used the latter criterion,[223] the model accepts the Court's stated standard as a given. Criteria supplied by commentators, however, suggest that the Court in insisting upon a constitutional nexus has opted for an unduly narrow construction of the framers' intent.[224] These alternatives, typically offered in a descriptive vein prior to the Court's clarification of its test in 1973[225] and in a prescriptive one thereafter, include standards

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221. Justice Harlan argued roughly along the above lines in dissents to major Warren Court decisions. *See* Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680-86 (1966) (Harlan, J., dissenting).

222. On the potential utility of discriminatory effect analysis to avoid broader questions of state authority posed by a due process inquiry, see Gunther, *supra* note 4, at 26-30.

223. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), *with* text accompanying notes 99-101 *supra* (voting in state elections fundamental). *Compare* Griffin v. Illinois, 351 U.S. 12 (1956) *and* Douglas v. California, 372 U.S. 353 (1963), *with* text accompanying notes 132-35 *supra* (freedom from the consequences of conviction fundamental). *Compare* Skinner v. Oklahoma, 316 U.S. 535 (1942), *and* Roe v. Wade, 410 U.S. 113 (1973), *with* text accompanying notes 147-49 *supra* (self-determination fundamental). *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969), *with* text accompanying notes 168-69 *supra* (interstate travel and migration fundamental). *Compare* Dandridge v. Williams, 397 U.S. 471 (1970), *with* text accompanying note 188 *supra* (basic necessities not fundamental). *Compare* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), *with* text accompanying note 206 *supra* (education not fundamental). *See also* Chicago Police Dep't. v. Mosley, 408 U.S. 92 (1972) (first amendment freedom of speech fundamental); Williams v. Rhodes, 393 U.S. 23 (1968) (first amendment freedom of association fundamental).

224. *See generally* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

225. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

such as historic high importance to the individual,[226] special significance to the individual and to society as a whole,[227] and centrality to the political process.[228] Nevertheless, though not obviously preferable to these other, more freewheeling criteria, the one adopted by the Court also is not at all obviously inferior to them. By minimizing the extent to which judges' personal values and the events most immediately shaping their consciousness figure in ranking individual interests, the Court's criterion promises more objective decisionmaking than one divorced from constitutional text.[229]

With these caveats, then, the model set forth in this Article is proposed for adoption by the Court. It takes into account differences among classifications that the Court has demonstrated a willingness to consider but that the method of analysis to which the Court outwardly adheres categorically excludes. Furthermore, it strikes a sound balance between flexibility and concreteness and poses only a relatively mild threat to existing precedent. Indeed, the model squares with the Burger Court's decisions well enough that the Court could invoke it to establish that cases irreconcilable in terms of the 2-tier model expressly used to decide them are in fact logically consistent. Finally, however, it must be acknowledged that, whether or not the Court adopts the proposed model, there is reason to fear that individual interests may not receive the protection that they deserve. Under almost any analysis, cases like *Rosario*,[230] *Ross*[231] and *Rodriguez*[232] manifest a tendency on the part of the Burger Court to overestimate the state's justification and minimize the discriminatory effect. By obligating the Court to articulate its characterizations of the four factors that appropriately determine a decision on constitutionality in discriminatory effect, the suggested test would check this tendency to some extent but not entirely. Like any legal standard, it is susceptible to conscious and unconscious abuse. The Court is urged, therefore, not only to adopt the model detailed in this Article but also to implement it with a more sympathetic attitude toward the plight of individuals disadvantaged by governmental action than the Court at times has displayed.

226. *Developments in the Law, supra* note 7, at 1129.

227. Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555, 598 (1970). For a variation on this test, see Comment, *supra* note 11, at 121-22 (consideration of individual and societal significance with emphasis on the former).

228. Goodpaster, *supra* note 28, at 482.

229. *See generally* Ely, *The Wages of Crying Wolf, supra* note 49; Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972).

230. *See* text accompanying notes 57-59, 61, 124-28 *supra*.

231. *See* text accompanying notes 142-46 *supra*.

232. *See* text accompanying notes 207-11 *supra*.

West's CA Codes - Labor

Notes of Decisions

1. Construction and application

Insofar as authority to adopt and administer rules and regulations under the fair employment practice act is concerned, the authority of the fair employment practice commission is exclusive, and the adoption and administration of rules and regulations by the department of industrial relations, in areas in which it is given such authority by statute, can not lawfully be such as would interfere with the execution of fair employment practices laws. Op.Leg. Counsel, 1959 S.J. 1229.

§ 1419. Powers and duties of commission

The commission shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the state as the Legislature authorizes.

(b) To meet and function at any place within the state.

(c) To appoint an attorney, and such clerks and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this part.

(f) To receive, investigate and pass upon complaints alleging discrimination in employment because of race, religious creed, color, national origin, ancestry, or sex.

(g) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(h) To create such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of race, religious creed, color, national origin, ancestry, or sex, and to foster through community effort or otherwise good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religious creed, color, national origin, ancestry, or sex.

(j) To render annually to the Governor and biennially to the Legislature a written report of its activities and of its recommendations.

(Added by Stats.1959, c. 121, p. 2001, § 1. Amended by Stats.1970, c. 1508, p. 2994, § 3.)

Historical Note

The 1970 amendment made this section applicable to discrimination based on sex.

Construction of Stats.1970, c. 1508, p. 2993, see Historical Note under § 1411.

Law Review Commentaries

Age discrimination in Employment Act of 1967. Jack Halgren (1968) 43 Los Angeles Bar Bull. 361.

Notes of Decisions

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1. In general

State statutes relating to discrimination in employment and in housing preclude local governments from enacting ordinances imposing additional restrictions in these two fields, but do not preclude creation of local advisory agencies or human rights commissions. 42 Ops.Atty.Gen. 114.

Insofar as authority to adopt and administer rules and regulations under the fair employment practice act is concerned, the authority of the fair employment practice commission is exclusive, and the adoption and administration of rules and regulations by the department of industrial relations, in areas in which it is given such authority by statute, can not lawfully be such as would interfere with the execution of fair employment practices laws. Op.Leg.Counsel, 1959 S.J. 1229.

2. Investigations

Under this section, the investigatory powers vested in the fair employment practice commission, though exercisable with or without the filing of a prior complaint or accusation, are not unusual in character and are not extraordinary in comparison with similar powers granted to other state agencies. Op.Leg.Counsel, 1959 S.J. 1225.

§ 1419.5 Prevention of discrimination in housing

The commission is empowered to prevent discrimination in housing as provided in Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code.

(Added by Stats.1963, c. 1853, p. 3830, § 4.)

Law Review Commentaries

Background and general effect of 1963 addition. (1963) 38 S.Bar J. 719.

California housing initiative. Laughlin E. Waters and Robert S. Thompson (1964) 39 Los Angeles Bar Bull. 328.

Forced Housing Act. Reg. F. Dupuy (1964) 37 So.Cal.L.R. 276.

Housing initiative: justice or injustice. Donald B. Hagler (1964) 39 Los Angeles Bar Bull. 444.

Rumford Act: protection or deprivation? Richard D. Aldrich (1964) 39 Los Angeles Bar Bull. 439.

Rumford Fair Housing Act reviewed. (1964) 37 So.Cal.L.R. 427.

A.B. 579 (Ch. 1267). DONAHOE. Adds and amends various secs., Ed. C., as enacted 1959 Reg. Sess., to revise provisions of Ed. C. re employment, classification, rights, and duties of noncertificated school district employees.

A.B. 583 (Ch. 443). HOUSE (Departmental). Amends Secs. 1101, 1102.1, 1104.1, Ag. C., re egg standards.

Provides that eggs with shells cracked to extent of exuding contents are not inedible unless exuded portion is moldy, filthy, decomposed, putrid, or otherwise unfit for human consumption.

Requires that grade tolerances for eggs shall not be allowed for eggs with shells cracked to extent that contents exude to outside surface.

Makes it unlawful to sell Grade C eggs to restaurants, institutions or labor camps, as well as to retailers and consumers, except as provided in the tolerance for Grade B eggs.

A.B. 584 (Ch. 22). HOUSE (Departmental). Amends Sec. 263.2, adds Secs. 260.25 and 260.85, Ag. C., re bovine brucellosis.

Prohibits purchase, possession, or use of any marking device that simulates official markings for identifying cattle vaccinated against brucellosis except by officials and accredited veterinarians. Prohibits purchase, possession, or use of vaccine or antigen containing brucella micro-organisms other than by officials and accredited veterinarians, except in accordance with rules and regulations of Director of Agriculture.

Requires slaughter of animals reacting positively to brucellosis test, rather than movement of such animals from the area.

A.B. 590 (Ch. 2154). MUNNELL. Amends and repeals various secs., U. I. C., re unemployment compensation tax contributions and benefit payments.

Increases from $3,000 to $3,600 maximum annual wages per individual upon which employer tax contributions are payable, revises and generally increases rate levels in employer tax rate schedules increasing maximum rate from 2.7% to 3% of subject wages, increases maximum unemployment compensation weekly benefit amount from $40 to $55 in $1 steps, eliminates limit of 18 times an individual's weekly benefit amount paid during a benefit year which can be charged to an employer's reserve account, and makes various related changes and revisions.

A.B. 594 (Ch. 1866). UNRUH. Repeals and amends various secs., Civ. C., re personal rights of citizens within State to equality of treatment in business establishments.

Declares that all citizens within jurisdiction of State are free and equal regardless of race, color, religion, ancestry, or national origin, and revises provisions presently declaring rights to equality of treatment of citizens in places of public accommodation and amusement and public places of amusement or entertainment, to specify that all are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Specifies, instead of present provisions imposing civil liabilities of minimum of $100, that whoever denies, or aids or incites denial, or makes discrimination, distinction, or restriction on basis of color, race, religion, ancestry, or national origin, with respect to proscribed conduct in connection with a business establishment, shall be liable to wronged person for actual damages and $250 in addition thereto.

A.B. 595 (Ch. 1164). CUNNINGHAM. Adds Sec. 211.5, H. & S. C., re special morbidity and mortality studies.

Makes records of interviews, written reports and statements procured by State Department of Public Health or by any person, agency or organization acting jointly with said department in connection with special morbidity and mortality studies, confidential insofar as identity of individual patient is concerned, and requires such records be used solely for purposes of the study.

Provides furnishing of such information shall not subject any person or organization to any action for damages.

Declares that such provisions shall not prohibit publishing by department of statistical compilations relating to morbidity and mortality studies which do not identify individual cases and sources of information or religious affiliations.

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COMMITTEES
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MANUFACTURING, OIL, AND MINING INDUSTRY
REVENUE AND TAXATION
WAYS AND MEANS

JOINT LEGISLATIVE BUDGET COMMITTEE
JOINT LEGISLATIVE AUDIT COMMITTEE

Assembly
California Legislature

JESSE M. UNRUH
MEMBER OF ASSEMBLY, SIXTY-FIFTH DISTRICT
CHAIRMAN
COMMITTEE ON WAYS AND MEANS

June 25, 1959

Honorable Edmund G. Brown
Governor of California
State Capitol

Dear Governor Brown:

Assembly Bill No. 594 which is awaiting your signature is a revision and extension of the present California civil rights statutes. This bill replaces the present Civil Code, Sections 51 thru 54, which were originally enacted in 1901 and 1905. A.B. 594 takes a generic approach to the problem of discrimination in places of public accommodation. Coverage is extended to all business establishments of every kind whatsoever and a civil penalty of $250.00 is established where such discrimination takes place.

A revision of our present civil rights statutes is required due to the uncertainty which has arisen in court decisions over exactly what type of establishments are included under present law. The fine of $100.00 which was established in 1901 is no longer adequate to even cover the minimal costs of a suit brought under the present statutes. The increase to $250.00 will come much closer to the actual costs incurred.

I respectfully request that you sign this bill into law.

Sincerely,

Jesse M. Unruh

Jesse M. Unruh

To: Honorable Edmund G. Brown
Governor of California

Bill Report

From: Office of the Attorney General

A. B. No. 594

By John S. McInerny
Deputy Attorney General

June 29, , 1959.

We have examined the above bill and find no substantial legal objection thereto.

John S. McInerny

89827 1-59 3500 SPO

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June 30, 1959

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ROSE WOODS
DEPUTIES

REPORT ON ASSEMBLY BILL NO. 594. UNRUH.

SUMMARY: Repeals and amends various secs., Civ. C., re personal rights of citizens within the State to equality of treatment in business establishments.

Declares that all citizens within the jurisdiction of the State are free and equal regardless of race, color, religion, ancestry, or national origin, and revises provisions presently declaring rights to equality of treatment of citizens in places of public accommodation and amusement and public places of amusement or entertainment, to specify that all are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Specifies, instead of present provisions imposing civil liabilities of a minimum of $100, that whoever denies, or aids or incites denial, or makes discrimination, distinction, or restriction on basis of color, race, religion, ancestry, or national origin, with respect to proscribed conduct in connection with a business establishment, shall be liable to wronged person for actual damages and $250 in addition thereto.

FORM: Approved. TITLE: Approved.

CONSTITUTIONALITY: Approved.

Ralph N. Kleps
Legislative Counsel

By Ernest H. Kunzi
Ernest H. Kunzi
Deputy Legislative Counsel

EHK:lc

BILL MEMORANDUM

Date: July 8, 1959

To: GOVERNOR BROWN

From: Julian Beck

Assembly BILL No. 594 By Unruh, Munnell, Bruce Allen, et al

VOTE: Senate Ayes 27
Noes 4 - Berry, Montgomery, Murdy and Williams.

Assembly Ayes 45
Noes 17-Backstrand, Bradley, Britschgi, Burke, Chapel, Conrad, Cusanovich, Ernest Geddes, Grunt, House, Lanterman, Levering, Luckel, Schrade, Shell, Thelin, and George Willson.

Assembly-concurred in Senate amendments Ayes 45 Noes 19.

Assembly Bill No. 594, to be known as the Unruh Civil Rights Act, amends the provisions of the civil code to broaden the prohibition against discrimination on the basis of race, religion or national origin to include any form of business establishment. Also increases the penalty recoverable in a suit by the injured party from $100 to $250.

4 No Votes in Senate, 14 in the Assembly.

Present law explicitly prohibits discrimination in only certain types of business establishments, e.g., inns, restaurants, etc. This bill expands it to include any type of "business establishment". This is vague, but a certain degree of ambiguity is probably desirable in a bill of this sort as it will permit courts to expand or contract the definition as the specific occasion demands. There is some opposition from individual citizens, but the letters indicate a misunderstanding of what the bill covers.

Recommendation: Approve (Stolz)

PS:hw

PRESS RELEASE - Bill Signed
Governor Edmund G. Brown
July 17, 1959

For Release Week of July 20, 1959--Governor Edmund G. Brown announced last week he has signed AB 594 (Jesse M. Unruh (D), Los Angeles), broadening the prohibitions in the Civil Code against discrimination on the bases of race, religion or national origin to include any form of business establishment.

The legislation also increases the penalty recoverable by suit by the injured party from $100 to $250.

Existing law explicitly prohibits discrimination only in certain types of business establishments such as inns and restaurants.

The Governor said Unruh informed him that court decisions have caused uncertainty about the coverage of certain businesses under the previous code provisions.

"This is the third major piece of anti-discrimination legislation that I have signed," the Governor said.

"This bill, along with the new Fair Employment Practices Act and the measure prohibiting discrimination in public housing mark the most significant advance in civil rights law in California history," he said.

"We are truly on our way to making this State a leader in the struggle for equal opportunity and human dignity," the Governor said.

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the ultimate certification could relate back to the time of the filing of the complaint.[42] *Duffy* reasoned that due to the nature of the confinement involved,[43] the recurring release of individual detainees from custody might make each of the originally named plaintiffs' claims for injunctive relief moot well before the district court could reasonably be expected to rule on a class action certification motion. This would forever forestall adjudication of the claims of the detainee plaintiffs.[44] Finally, the court held that the lower court erred, as a matter of law, in denying the motion for severance of the claim for injunctive relief and in viewing the cause predominantly as one for money damages.[45] *Duffy* found that "[t]he motion for severance conclusively established that phase of the cause as predominantly for injunctive relief."[46]

The *Duffy* decision reaffirmed the Ninth Circuit's position that class actions brought by pretrial detainees, which challenge conditions of their confinement, belong to the narrow class of cases in which termination of the class representatives' claims does not moot the claims of unnamed class members. In this respect, the circuit's approach is consistent with the stance of the Supreme Court[47] and that of earlier Ninth Circuit decisions on this issue.[48]

D. Mootness and Summary Judgment

In *Seay v. McDonnell Douglas Corp.*,[49] nonunion employees brought an action challenging the purposes for which the defend-

42. 528 F.2d at 956.

43. The overall average length of confinement was only 7.65 days *Id.*

44. *Id.* The court cited as other examples of the application of this "relation back" principle Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1974), and Frost v. Weinberger, 375 F. Supp. 1312, 1318-19 (E.D.N.Y. 1974), *rev'd on other grounds*, 515 F.2d 57 (2d Cir. 1975).

45. 528 F.2d at 957

46. *Id.*

47. *See* Gerstein v. Pugh, 420 U.S. 103 (1975). *Gerstein* involved a class action brought by prisoners against county judicial and prosecutorial officials, claiming a constitutional right existed for a judicial hearing on the issue of probable cause for pretrial detention and requesting declaratory and injunctive relief. The court held that since pretrial detention is temporary in nature, it therefore would be most unlikely that any given individual could have his or her constitutional claim decided on appeal before release or conviction. Consequently, *Gerstein* found the case was a suitable exception to the mootness rule. *Id.* at 110 n.11.

48. *See, e.g.*, Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974).

49. 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.J.). Earlier, the Ninth Circuit had reversed the district court's order dismissing the suit on the ground that its jurisdiction had been preempted by the National Labor Relations Act. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970). Upon remand, the district court entered summary judgment against the plaintiffs due to the fact that the defendant union had

ant union used agency fees paid by these employees pursuant to a collective bargaining agreement.[50] The action was dismissed by the district court, but on appeal, the Ninth Circuit held that: (1) even though the defendant had ceased its allegedly wrongful conduct after the litigation had begun, the case was not moot;[51] (2) despite the development of an intra-union remedy, the district court erred in granting summary judgment in favor of the union;[52] and (3) the district court did not abuse its discretion in denying the plaintiffs' motions to amend, for class action certification and for joinder.[53]

First, *Seay* stated that where a defendant voluntarily ceases its allegedly wrongful conduct after the onset of litigation, as did the union here, a court is not necessarily deprived of its power to act. An action is only moot, noted the court, if it is absolutely clear that the wrongful conduct complained of will not recur. The *Seay* court indicated that there were no assurances given by the defendant union that it would not reinstitute its allegedly wrongful acts after termination of the lawsuit; hence, the court did not find the action moot. Second, although the district court found that the intra-union remedy was a fair, reasonable and adequate procedure,[54] *Seay* held that it erred in granting summary judgment for the defendant since the plaintiffs had raised several genuine factual objections to the procedure.[55] Finally, the court dealt with the plaintiffs' contention that the district court had abused its discretion with respect to the plaintiffs' motion to certify the class or to join additional parties. At the time the motion to certify the case as a class action was filed, only one other person

voluntarily adopted a procedure whereby plaintiffs were entitled to a rebate, which the court felt was a fair, reasonable and adequate remedy on its face. The district court's opinion is reported at 371 F. Supp. 754 (C.D. Cal. 1973).

50. In International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), the Supreme Court held that unions may not use dues or agency fees to finance political activities if members or fee-payers object to the use of those funds for such purposes. The plaintiffs contended that the defendant union was utilizing agency fees to finance political activities over the plaintiffs' objection. 533 F.2d at 1128.

51. 533 F.2d at 1130.

52. *Id.* at 1130-32.

53. *Id.* at 1132.

54. 371 F. Supp. at 763.

55. The plaintiffs questioned whether the union would administer the plan fairly and honestly. In addition, they argued that by shifting the burden of proof from the defendant to the plaintiffs, the union remedy deprived them of an important procedural right to which they would be entitled if a judicial remedy were utilized under Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963). *Brotherhood* held that a union should bear the burden of proof in establishing the amount of a plaintiff's fees which it is entitled to retain. *Id.* at 122.

had been suggested by the plaintiffs to be part of the class they were seeking to represent.[56] The district court found that the number of potential plaintiffs was not so great as to make joinder impractical and consequently denied the motion to certify. A full year later, plaintiffs moved to join forty-six employees as additional party plaintiffs, but the trial court denied this motion as being untimely. Four months after the joinder motion, plaintiffs moved to amend their complaint to include several other causes of action,[57] but the district court also denied this motion. The Ninth Circuit panel in *Seay* concluded that since these denials were within the discretion of the trial court and the plaintiffs failed to show that the court abused its discretion, the trial court had not erred in denying these motions.

The *Seay* decision expressly rejected the result reached by the Tenth Circuit in *Reid v. UAW, District 1093*[58] regarding the propriety of granting a motion for summary judgment. The *Reid* court indicated that the plaintiffs' claim that the intra-union remedy might be unfairly applied only amounted to conjecture and speculation, and, as a result, was not sufficient to raise a genuine issue of material fact. Therefore, summary judgment in *Reid* was upheld. However, *Seay* indicated that such objections do raise genuine issues of fact which obligate the trial court to hold a hearing on the disputed factual questions.

E. Guam's Elimination of Appellate Jurisdiction in the District Court

In *Agana Bay Development Co. v. Supreme Court of Guam*,[59] the Ninth Circuit held that the territory of Guam could eliminate

56. The class the plaintiffs sought to represent consisted of those who had formally objected to the union's use of their fees for political purposes.

57. The plaintiffs questioned whether the union could use agency fees to finance organizing expenses, the union strike fund, death benefits for union members and the union newspaper.

58. 479 F.2d 517 (10th Cir. 1973). As in *Seay*, nonunion member plaintiffs in *Reid* brought an action against a union for declaratory judgment, injunctive relief and damages, alleging over the plaintiffs' objections that the defendant had wrongfully spent agency fees for political purposes. The plaintiffs were compelled to pay these fees under a collective bargaining agreement. The trial court had granted summary judgment for the defendant, which was affirmed on appeal.

59. 529 F.2d 952 (9th Cir. Jan., 1976) (per Carter, J.). Agana Bay Development Co., the appellee in an action which had been appealed to the Supreme Court of Guam, sought a writ of prohibition from the district court directing the Guam Supreme Court to cease all appellate proceedings in the case. The district court issued a peremptory writ of prohibition pursuant to 28 U.S.C. section 1651, which the Guam Supreme Court then appealed to the Ninth Circuit.

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C. Adequacy of Intra-Union Remedies

Almost a decade ago, nonunion employees brought suit in district court, challenging a union's expenditure of compulsory agency fees for political and ideological purposes over their objection as violative of the fair representation duty.[32] A first appeal followed the district judge's dismissal of the suit on the ground that the preemption doctrine created exclusive jurisdiction in the National Labor Relations Board. The Ninth Circuit reversed,[33] holding that the district court had jurisdiction under section 301 of the LMRA.[34] Prior to the district court's reconsideration of the case, the union adopted an intra-union procedure whereby employees could receive a rebate of that portion of their dues or fees spent for political activities to which they objected. On remand, the district court granted the union's motion for summary judgment on the issue of breach of the duty of fair representation, finding that the internal union remedy was a fair, reasonable and adequate procedure.[35] Plaintiffs in *Seay v. McDonnell Douglas Corp.*[36] brought this second appeal, contesting the propriety of the granting of summary judgment. The Ninth Circuit held that the district court erred in not granting the employees a full hearing on the fairness and adequacy of the intra-union remedy[37] and declined to follow the Tenth Circuit's contrary result in *Reid v. UAW, District 1093*,[38] a case identical to the present one.

In reaching its conclusion that a genuine issue of fact was

32. The Supreme Court has held that unions may not appropriate union dues and agency fees to finance political activities if members or fee payers object to the utilization of these funds for such purposes. *See, e.g.*, Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Although *Street* and *Allen* were decided under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), the Ninth Circuit has held that these holdings are equally applicable to the National Labor Relations Act, the Act involved in the present litigation. *See* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970).

33. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970).

34. *Id.* at 999-1000. Section 301 of the Labor-Management Relations Act is codified at 29 U.S.C. § 185 (1970).

35. Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 763 (C.D. Cal 1973).

36. 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.j.). Plaintiffs also appealed orders of the district court denying their motions for class action status and denying them leave to amend the complaint. *Id.* at 1129 n.4.

37. *Id.* at 1132.

38. 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973). Both *Reid* and *Seay* involved the same factual issues, the same legal issues, the same employer (McDonnell Douglas Corp.) and identical prayers for relief. 371 F. Supp at 756. In affirming the district court's order granting the union's motion for summary judgment, the *Reid* court held that plaintiffs' conjectural statements condemning the fairness and effectiveness of the union remedy did not suffice to create an issue of fact. 479 F.2d at 520.

presented, the *Seay* court focused on three critical factors. First, under the rule of *Brotherhood of Railway Clerks v. Allen*,[39] the union bears the burden of proof in ascertaining the percentage of plaintiffs' fees which it is entitled to retain, whereas under the remedy established by the union, the burden falls on the employees to challenge the amount allocated for political purposes. Thus, the court agreed with the plaintiffs' contention that the internal union remedy deprived them of a procedural right to which they were entitled were a judicial remedy to be imposed. Second, the court noted that the union had been on notice since the Supreme Court decision in *International Association of Machinists v. Street*[40] that unions must provide for a rebate of fees misappropriated for political purposes, yet they did not comply with that requirement until twelve years after *Street* was decided and six years after the institution of the instant action. Such conduct, the *Seay* court maintained, raised serious doubts concerning the willingness and ability of the union to administer its internal remedy fairly and accurately. The Ninth Circuit further observed that to require the employees to exhaust the intra-union remedy, with its lengthy appellate procedure, would impose an intolerable burden on the plaintiffs in *Seay*.

Although the Ninth Circuit evinced a willingness to scrutinize intra-union remedies, *Seay* does not represent an erosion of the policy favoring minimum judicial interference in internal union affairs. Rather, the union's dilatory conduct and the lengthy period of litigation involved in this case suggest that the Ninth Circuit will require a judicial determination of employees' rights in the absence of guarantees that the union procedures will be fairly and accurately administered.

D. Damages and Attorneys' Fees for Unlawful Secondary Activity

In *Mead v. Retail Clerks Local 839*,[41] the Ninth Circuit considered the propriety of a district court's issuance of an order awarding damages to a primary employer injured by unlawful secondary activity and denying the recovery of attorneys' fees incurred in bringing the damage suit. The Meads, plaintiffs and storeowners, had refused to sign a contract which contained a "demonstration clause." This provision provided that food dem-

39. 373 U.S. 113 (1963).
40. 367 U.S. 740 (1961).
41. 523 F.2d 1371 (9th Cir. Oct., 1975) (per Browning, J.).

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Title VII are designed to achieve the same antidiscriminatory purposes.[47] Moreover, the definition of "discrimination" has evolved through equal protection cases and it should not be inferred that it means something different under Title VII.[48]

The availability of Title VII as a remedy for employment discrimination thus neither precludes a court from deciding the permissibility of an affirmative action plan on equal protection grounds nor prevents the *Bakke* decision from having precedential value in the employment context. Reverse discrimination challenges to voluntary affirmative action plans may be brought under the equal protection clause independently of Title VII, and even if they are brought under Title VII, equal protection cases may have precedential value. The *Bakke* decision is therefore certainly relevant in the public employment context. If it is extended to reverse discrimination cases in public employment, the impact will be significant. Every voluntary affirmative action hiring plan may be subject to challenge. The remainder of this article examines the possible impact of this extension on affirmative action plans in California cities.

II. Affirmative Action Plans: The Implications of *Bakke*

A judicial determination that voluntary affirmative action plans in public employment are unconstitutional would cut deeply into the present employment practices of municipalities. Many California cities have voluntarily implemented affirmative action plans.[49] These plans include a variety of measures to increase the number of minor-

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are applicable in Title VII actions, may be of far more significance than its narrow holding suggests. Indeed, the case may have an impact on the continuing viability of the Title VII standard of proof. In a Title VII action, as the law now stands, plaintiffs can prove racial discrimination by showing that an employment practice has a discriminatory effect upon a particular group. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Washington v. Davis, 426 U.S. 229, 238-39 (1976), however, the Supreme Court established a separate standard of proof for discrimination cases under the equal protection clause. In equal protection cases, discriminatory purpose rather than discriminatory effects must be shown to prove racial discrimination. General Electric may suggest that since the purposes behind both Title VII and the equal protection clause are the same, the standard of proof under each may have to be the same. The Court in General Electric did not reach the issue since it said that the plaintiff did not make out a case even under the lesser Title VII standard. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 408-409 (1976). It seems inevitable, however, that the Court eventually will face this issue.

[47] General Elec. Co. v. Gilbert, 97 S. Ct. 401, 412-13.

[48] *Id.* at 413.

[49] California cities with populations over 70,000 (with the exception of Davis) were contacted for the purposes of this analysis. References herein are to the affirmative action plans of the 21 cities that responded: Berkeley, Chula Vista, Davis, Downey, Fresno, Long Beach, Los Angeles, Modesto, Oakland, Redding, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, Santa Barbara, Santa Monica, Stockton, Torrance, Vallejo, Whittier (copies of all the affirmative action plans referred to are on file with the U.C.D. L. Rev.).

ity personnel in the public labor force.

For the purposes of analysis, the various means adopted by California cities to implement their affirmative action programs can be separated into three broad categories. First, affirmative action plans in nearly every city contain elements designed to reduce the barriers that exist to minorities seeking public employment. Second, there are elements designed not just to reduce barriers to minority employment, but actively to recruit minorities into the public work force. Finally, many cities have implemented selection procedures designed directly to hire more minority personnel.

Whether and to what extent any of the affirmative action measures within these categories will be vulnerable to a reverse discrimination challenge, however, depends on several factors. Assuming a court faces an equal protection claim by a nonminority and assuming it would apply the traditional strict scrutiny test to the challenged affirmative action measure, the court would first consider whether the measure classifies people by race. This can be determined either by what the program says on its face or by the way it is administered or applied.[50] If the challenged measure effects a racial classification in either of these ways, the court must determine whether the plaintiff purposefully was denied a job because of his race.[51] In other words, the plaintiff must show that he would have been hired but for his race, and that other individuals who were less qualified were hired instead. Unless the employer can show that there was a legitimate, nondiscriminatory reason why the plaintiff was not hired,[52] the court will conclude that the affirmative action measure imposed an unconstitutional detriment. The employer apparently then has the

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[50] The "as applied" type of equal protection analysis was used in Yick Wo v. Hopkins, 118 U.S. 356 (1886) (city licensing ordinance that prohibited laundries in buildings not made of brick or stone unless consent of board of supervisors was obtained held invalid on the grounds that it was administered in a discriminatory manner against Chinese). The Court outlined one of the now generally recognized methods of proving *de jure* discrimination:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Id.* at 373-74.

[51] Washington v. Davis, 426 U.S. 229, 238-39 (1976) (minority plaintiffs had to show that police department personnel test was administered with a discriminatory purpose to sustain an equal protection claim).

[52] Franks v. Bowman Transp. Co. Inc., 424 U.S. 747, 772-73 (1976) (*cited as analogous in* Bakke v. Regents, 18 Cal. 3d 34, 63-64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976)). In Title VII cases, once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to show that the challenged employment practice is related to job performance and fulfills a genuine business need, Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971), or that there was some legitimate, nondiscriminatory reason for the employee's rejection, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

burden of showing that the affirmative action measure is justified by past discrimination. If the *Bakke* decision is followed, this will mean that an employer will have to show specific instances of past discriminatory treatment. If this burden is not satisfied, the challenged affirmative action measure will be invalid. This basic analysis is applicable to each affirmative action category.

A. Barrier-reducing Measures

The elements of affirmative action plans designed to reduce barriers to minorities seeking public employment present no constitutional difficulties on their face. They vary in different cities from mere statements of hiring policy to actual job restructuring, but most of them are phrased in racially neutral terms. Cities use three basic means to reduce barriers to minority employment.

One method is to ensure that all qualifying tests, whether written, oral, or physical, are job-related.[53] The standards for determining job-relatedness are set out in Equal Employment Opportunity Commission (EEOC) regulations.[54] Most plans require conformance with these regulations to ensure that no test has a discriminatory impact on any one group of individuals.[55]

Second, many cities seek to reduce barriers to minority employment through job restructuring. Job restructuring eliminates arbitrary and unnecessary job prerequisites and retains only the education, experience, and physical qualifications necessary to perform a particular job.[56] The purpose is to eliminate job qualifications that have a discriminatory effect on minority or disadvantaged applicants. In order to make entry-level positions available to a greater range of

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[53] "Job-related tests" are defined as those that are predictive or significantly correlated with important elements of work behavior relevant to the job for which candidates are being evaluated. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1975), *as amended*, 41 Fed. Reg. 51, 984 (1976).

[54] *Id.* The EEOC Guidelines were accepted as the appropriate standard to determine whether a test is job-related in Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[55] Most cities would prefer that all of their tests are job-related and nondiscriminatory, but given the current art of testing this is difficult to attain in practice. For this reason, employers may find strict compliance with EEOC Guidelines unworkable and unrealistic in some situations. For a discussion of this problem, *see* Johnson, *Albemarle Paper Co. v. Moody: The Aftermath of Griggs and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976); White and Francis, *Title VII and the Master of Reality: Eliminating Credentialism in the American Labor Market*, 64 GEO. L.J. 1213 (1976).

[56] Job restructuring can also include creating new entry level classifications with promotional ladders. Cities can create classifications for paraprofessionals, technical or semi-skilled jobs to accelerate the transition of minorities into management and professional categories. *E.g.*, City of Berkeley Affirmative Action Program (Draft May 4, 1976), at 15; City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 7-8; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 15-16; City of Stockton Affirmative Action Plan (1973), at 11-12.

persons, strict educational and experience requirements are made more flexible[57] and job classifications are restructured to include more trainee positions.[58]

The third method cities use to reduce barriers to minority employment is through personnel education and training sessions.[59] These programs, also racially neutral, are designed to educate supervisors and managers about cultural and socio-economic differences among employees. Barriers are removed by reducing the intentional and unintentional discriminatory tendencies of hiring authorities that are the result of bias, ignorance and misinformation.

The constitutional permissibility of racially neutral means to reduce barriers to minority employment is predicated on the premise that barriers are reduced not just for minorities, but for members of the majority as well. Nonminorities suffer no detriment when barriers are reduced for all. Ensuring that tests and minimum qualifications are job-related potentially reduces barriers to both minorities and nonminorities. Educating hiring authorities to cultural differences tends to reduce or remove personal biases that should not be

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[57] For example, high school equivalency certificates can be used to satisfy a job requirement for high school graduation, and education requirements can be stated in terms of course equivalents rather than degree attainments. Also, additional education can be substituted for the required experience, and volunteer work can satisfy experience requirements where appropriate. *E.g.*, City of Berkeley Affirmative Action Program (City Council Resolution No. 45, 257-N.S. revised to December 17, 1974), at 6; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 15-16; City of Torrance Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 3, at 3.

[58] Trainee or apprenticeship classifications can be created to offer employment to a wider range of job applicants. Such classifications have lesser education and experience requirements and may be limited in duration, but they usually are intended to prepare persons to qualify for regular entry level positions. *E.g.*, City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 8; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 7 and Appendix "C"; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 16-17; City of of Stockton Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 7, at 1; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 8-9.

[59] Special orientation sessions for department heads and other supervisory personnel usually are intended to improve the understanding of minority group cultures, increase sensitivity and awareness of the causes and effects of discrimination, and create a positive attitude towards the employment of minorities. Training sessions are conducted to explain the intent of the affirmative action plan to supervisory personnel and to inform them of their individual responsibility for its implementation. *E.g.*, Affirmative Action Program for the City of San Diego (1972), at 2; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 6; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 6.

present in the hiring process in the first place.

In practice, however, these affirmative action measures may not merely reduce barriers to minority employment. They may afford preferential treatment to minorities in the way they are administered and thereby effect a classification on the basis of race. Admittedly, it would be an unusual situation in which a nonminority could complain of reverse discrimination because of the way an affirmative action measure to reduce barriers is administered. Measures to reduce barriers to minority employment largely achieve no more than an increase in the number of minority job applicants, and it would be difficult to show that such measures were the "but for" cause of a discriminatory hiring decision.

Nevertheless, certain measures to reduce barriers may be administered in ways that expose employers to reverse discrimination challenges. For example, while job qualifications legitimately may be restructured to reduce artificial barriers to employment opportunities, they also can be restructured to remove only the barriers that exist to minorities. If so, the practice may be vulnerable to an equal protection claim. If trainee jobs are made available only to minorities or if certain educational or experiential requirements are waived only for minority job applicants, an employer may be liable for administering a facially neutral affirmative action measure in a racially discriminatory manner. Nonminority job applicants excluded from the opportunities available only to minorities would have no difficulty showing that such practices effect a racial classification. They would then have to prove, however, that the employer purposefully denied them access to trainee positions or to a job because of their race. This possibly can be shown where the employer is administering the challenged employment practice as part of an affirmative action plan. Affirmative action plans often are implemented expressly for the purpose of including more minorities in the public work force. An employer's intent to discriminate against nonminorities can be inferred readily when he takes action pursuant to this purpose. If discriminatory purpose can be shown, the nonminority plaintiff then has a sound basis for arguing that he would have been hired but for his race. If the plaintiff also can show that he was not hired because the employer was hiring less qualified minorities instead, he can establish a prima facie case. A court would conclude that the nonminority plaintiff suffered an unconstitutional detriment by being denied a trainee position or a job by reason of his race. Unless the employer can prove that the plaintiff was rejected for some nondiscriminatory reason or that the employment practice was justified by past discrimination, the plaintiff will prevail. Depending on whether the plaintiff's action was for declaratory relief or for an injunction, the court either will invalidate the challenged affirmative action measure or order the employer to hire him.

B. Recruitment Measures

Like affirmative action measures to reduce barriers, active "outreach" and recruitment efforts to increase minority hiring pose constitutional problems only in unusual situations. In fact, the *Bakke* court indicated that the recruitment of minorities was a constitutionally acceptable alternative means to the special admissions program of achieving the integration of the medical school.[60] While these measures do classify people on the basis of race, in most situations they cause no identifiable detriment to nonminorities.

Recruitment measures in public employment vary in extent from merely advertising on the city letterhead and bulletins that the city is an "equal opportunity/affirmative action employer" to maintaining active liaison with minority organizations in the community. Job openings are often advertised by the use of mailing lists, newspapers, magazines and radio, with particular emphasis on media likely to reach the minority population. Vigorous outreach programs, on-site recruiting, and testing activities in areas of the city where minorities are a large percentage of the population also are implemented to improve the recruitment of minorities.[61]

Most recruitment and outreach affirmative action measures merely open up channels of communication which have never existed. This

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[60] Bakke v. Regents, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976).

[61] Some cities also maintain active liaison with minority organizations or concerned community agencies to obtain employment referrals of minority applicants and to disseminate information about job openings. Summer, part-time and intern positions are used to encourage minorities to remain in school in order to later qualify for career positions. Cooperative planning with high school, colleges and training schools helps to tailor the curricula to job skill requirements and stimulate access to employment with the city. *E.g.*, City of Berkeley Affirmative Action Program (City Council Resolution No. 45, 257-N.S. revised to December 17, 1974), at 5 and (Draft May 4, 1976), at 11-13; City of Downey Affirmative Action Plan (approved by City Council Resolution No. 3109), at 115; City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 8-9; Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted by City Council Resolution No. C-22095 June 15, 1976), at 91; City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 20-22; City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 3; City of Oakland Affirmative Action Plan (Administrative Instruction 515, approved by City Council Resolution No. 51836 C.M.S., as amended July 20, 1976), at 5; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 6; Affirmative Action Program for the City of San Diego (1972), at 1; City and County of San Francisco Civil Service Commission Affirmative Action in Employment (August 1972), at 3; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 4-12; City of Stockton Affirmative Action Plan (1973), at 18; City of Torrance Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 4, at 1-3; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 5.

is usually accomplished through means that either already are utilized with respect to the majority or which are implemented for the benefit of the entire community. A nonminority complaining of reverse discrimination thus is not likely to challenge a recruitment measure directly.

Such measures, however, may provide a nonminority plaintiff with additional evidentiary support for his reverse discrimination challenge. Where cities are actively recruiting minorities as part of an affirmative action plan they are obviously doing so to increase the number of minorities in the public work force. A recruitment measure thus can manifest an intention on the part of a city to hire more minorities over nonminorities in filling job openings. Proving such an intention is an integral part of a nonminority's prima facie case of reverse discrimination. A rejected nonminority job applicant seeking injunctive or declaratory relief against a public employer is therefore likely to seize upon a city's minority recruitment campaign as additional evidence of purposeful discrimination.

One recruitment measure likely to offer the strongest evidentiary support for a nonminority's reverse discrimination claim against a city is the use of personnel sanctions.[62] In some cities the personnel director is subject to sanctions, such as formal reprimands or denials of merit increases, for failing to produce an applicant pool containing a certain racial mixture. A nonminority plaintiff is likely to point to the use of such sanctions as evidence that city officials are under great pressure to hire more minorities to reach affirmative action goals. Such evidence may permit a court to infer that a city engaged in purposeful discrimination.

C. Personnel Selection Procedures

While affirmative action measures to reduce barriers to minority employment and to increase the recruitment of minorities are important elements of city programs, personnel selection procedures are more direct means of effectuating affirmative action goals. As such, they are much more likely to receive careful judicial scrutiny.

Personnel are selected for public employment in California under a merit system.[63] The selection procedure at the core of this system is

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[62] For example, Santa Barbara's affirmative action plan places the burden of improving both the volume and percentage of minority applicants for city employment on the Personnel Director. If the composition of the applicant pool fails to reflect within 20% the city population in terms of race, ethnicity, and sex for less than 80% of the time, remedial action will be taken. Failure by the Personnel Director to accomplish the goal of population parity in the applicant pool will constitute grounds for sanction by the City Administrator. City of Santa Barbara Affirmative Action Program (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 8-9.

[63] In California, the State Personnel Board is vested with responsibility for establishing and administering merit systems for personnel selection in local

the "rule of three." Under this procedure job applicants are given civil service tests and placed on a rank list according to their scores. The top three are taken from the list and "certified." Certification entitles the individual to a personal interview, after which the personnel director or hiring authority makes the final selection. The hiring authority may select any of the certified applicants. They are considered equally qualified. As an integral part of the merit system, the rule of three allows only "qualified" applicants to become eligible for hiring.

Problems may arise, however, when the civil service system is used to implement affirmative action plans. Viewed separately, both the civil service system and affirmative action plans are intended to promote equality and fairness. The civil service system provides an objective means of selecting qualified persons for a particular job. Affirmative action plans are intended to be an effective means of achieving equal employment opportunity. However, when the racially neutral civil service selection procedures are used to implement racially based affirmative action goals and timetables,[64] the limits of constitutional permissibility can be exceeded. In public employment, the problem arises when an affirmative action plan has highly specific goals and timetables, or when a city has adopted specific procedural means to increase minority certification.

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government agencies. The Board has such authority where merit systems are required as a condition for receiving state funding or for participating in a federal grant-in-aid program. Approved Local Merit System Standards were adopted by the State Personnel Board and constitute the criteria that must be met by local agencies to qualify for state and federally funded programs. 2 CAL. ADMIN. CODE §§17010-17592 (*as amended* January 17, 1976). Local agencies can establish their own merit systems with personnel standards applicable to their own employees, but they must meet the state and federal standards to qualify for state and federal funds. CAL. GOV'T CODE §19802 (West Supp. 1976). For general State Civil Service Provisions *see* CAL. GOV'T CODE §§18500-19810 (West 1963 & Supp. 1976).

[64] Some cities simply state that their goal is to make the city work force reflect the racial, sexual and ethnic ratios in the overall city population. *E.g.*, Affirmative Action Program for the City of San Diego (1972), at 1; City and County of San Francisco Civil Service Commission Affirmative Action In Employment (August 1972), at 3; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 2. Most cities, however, have more specific goals and timetables. Groups that are underrepresented in city government (*e.g.* blacks, Spanish-surname, Asian, Native American), are listed beside figures showing their percentage composition in the city population or the available labor market. The difference in representation constitutes the goal, and the timetable for reaching this goal may be set according to the number of employees in a department, the anticipated turnover, the anticipated new positions and the applicant pool structure. Some cities set short term goals to be reached in one year in addition to long term goals to be reached in 5-10 years. The detail and specificity of the goals and timetables varies from setting them out in percentage figures for each department to stating them generally for city employment as a whole. *E.g.*, City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 4-7; Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted

1. Specific Goals and Timetables

A city may be subject to a reverse discrimination challenge when it outlines highly specific affirmative action goals and timetables. While some cities merely express their endorsement of the goal of equal employment opportunity,[65] many cities commit themselves to achieving fixed percentages of minority representation in the work force within certain periods of time.[66] Usually the goal is to achieve minority representation in the public work force on a parity with minority representation in the community or in the labor market for particular jobs.[67] Many cities specify that this will be achieved in as little time as five years.[68]

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by City Council Resolution No. C-22095 June 15, 1976), at 24-90; City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 11-18, 47-147; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 9-11; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at Appendix B; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 26-29; City of Stockton Affirmative Action Plan (1973), at 15-17.

[65] For example, Whittier has adopted no written affirmative action plan, but commits itself to the goal of equal employment opportunity. Whittier believes that the goals of affirmative action depend on good management practices rather than formalized plans. Letter from Louis G. Lopez, Ass't City Manager and Personnel Director, City of Whittier, to authors (January 25, 1977) (on file with U.C.D. L. REV.).

[66] For example, the City of Los Angeles has formulated quantitative affirmative action goals in some detail. As an illustration of the degree of specificity, a table from the Los Angeles Affirmative Action Plan for one category, protective services, is reproduced:

Total Number of Employees in Protective Services: 7864	Goals 1976-77		Goals 1977-78		Goals 1978-79		Goals 1979-80		% Change in Representation from 1974 - 1980
	No.	%	No.	%	No.	%	No.	%	
Black	1181	15.0	1316	16.7	1451	18.4	1586	20.1	+8.5
Span.-Surname	971	12.3	1095	13.9	1217	15.4	1336	16.9	+7.5
Asian-Amer.	158	2.0	198	2.5	238	3.0	278	3.5	+2.5
Amer. Indian	54	0.7	62	0.8	66	0.8	71	0.9	+0.3
Women	441	5.6	534	6.8	628	8.0	720	9.2	+5.9
TOTAL	2805		3205		3600		3991		

City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 17.

[67] Many cities use the representation of groups in the general population as the basis for setting goals. This may be a fairer method than basing goals on a group's availability in the labor force if a discrepancy in the two figures is partly due to discriminatory practices in the past. It may be more meaningful, however, to use availability in the labor force as a basis for setting goals when a job requires specialized knowledge or a highly technical skill and the number of qualified minorities in the labor force is far below population parity.

[68] For example, San Diego's goal for "eliminating any disparity between the minority composition of City employment and total City population" is to be reached in five years. Affirmative Action Program for the City of San Diego

Affirmative action plans administered under specific goals and timetables may have many of the characteristics of the minority "quota"[69] invalidated in *Bakke*. When a city commits itself to increasing the number of minorities in the public work force within a specific period of time, it may be under considerable pressure to hire minorities over more qualified nonminorities. The pressure will be particularly acute when a city uses sanctions to enforce affirmative action goals,[70] when the disparity between the proportion of minor-

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(1972), at 1; Santa Barbara's goal to "bring the City work force composition to where it reflects the racial, sex and ethnic ratios in the overall City population" is to be reached in 10 years. City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 3-5; Long Beach's goal to have "a work force which is representative of the race and sex mix within the labor market" is to be reached within 12-15 years. Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted by City Council Resolution No. C-22095 June 15, 1976), at 86; Modesto believes it can reach the goal of achieving "a representation of minority and disadvantaged persons in City employment at all levels and in all categories" within four years. City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 5.

[69] Cities are very careful not to characterize their affirmative action goals as imposing minority "quotas." In fact, cities often have express disclaimers such as "these goals are not a quota system but merely indicate guidelines" or "these goals shall be considered as flexible targets and not as rigid standards." *E.g.*, City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 11; City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 2; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April, 1976), at 9. Quotas are seen as devices to hire minorities just for the sake of their minority status and without regard for their qualifications. Hence, cities prefer to emphasize that their affirmative action plans merely impose "goals," and in support of this proposition they point out that through the operation of the civil service rule of three, only "qualified" minorities can be hired.

Whether this characterization actually will enable a city to avoid the problem encountered by the University in Bakke, however, is uncertain. The rule of three, by definition, only certifies "qualified" applicants. As in Bakke, however, a court is likely to make an inquiry into whether a minority with a lower test score actually was preferred over a nonminority with a higher score despite the rule of three. Moreover, the Bakke case prohibits discrimination among "qualified" applicants. The decision is not limited to prohibiting discrimination only as between qualified and non-qualified applicants.

[70] For example, Santa Barbara's affirmative action plan imposes sanctions on individual department heads and other hiring authorities if they are judged deficient in their responsibility to implement affirmative action goals. "Deficient" is defined as reaching less than 80% of planned accomplishment. Whenever any hiring authority performs under 80%, he must report to the City Administrator setting out the efforts he has made and the grounds for his performance deficiency. No merit increases in salary or authority will be granted to hiring authorities who have been judged deficient. If a particular hiring authority is found to be consistently remiss in meeting affirmative action goals, the City Administrator may (1) remove the individual for inattention to duty, (2) formally reprimand the individual and include an affidavit evidencing such reprimand in his personnel file, or (3) transfer the authority to make hiring decisions to an immediate superior, such as the Personnel Director or City Administrator. City of Santa Barbara Affirmative Action Program (July, 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 7-8. Similarly, Riverside's

ities in the work force and their representation in the community is exceptionally large, or when community pressure to hire more minorities is strong. Such pressure can result, like a quota, in discrimination against nonminorities in the hiring process. It increases the likelihood that at least some hiring decisions are made for the purpose of preferring minorities over nonminorities solely for their minority status.

When a city prefers minorities in hiring decisions in order to meet specific goals and timetables, a rejected nonminority job applicant may bring an equal protection claim. The plaintiff would allege that the city administered its personnel selection procedures in a discriminatory manner. A racial classification can be shown if the plaintiff proves that the employer considered race as a factor in making hiring decisions. The plaintiff must prove that he would have been hired but for the employer's purposeful use of racial criteria in hiring less qualified minorities over him. Discriminatory purpose can be demonstrated by showing that the employer's personnel selection procedures were administered pursuant to an affirmative action plan. Once the plaintiff establishes this prima facie case, the employer must either show some nondiscriminatory reason why the plaintiff was not hired, or prove that the city's personnel selection procedures were administered according to goals and timetables to correct specific instances of past discrimination. If this burden is not satisfied, a court may order that the plaintiff be hired and declare the city's selection procedures invalid as administered.

2. Certification Procedures

Charges of reverse discrimination also may arise when a city adopts specific procedural means to increase minority certification. In addition to the traditional civil service rule of three, some cities utilize selection procedures that are designed to increase the probable number of minorities within the group of certified applicants for a particular job. These procedures include what are known as the rule of five,[71] band certification[72] and selective certifica-

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plan provides that:

> Every city employee shall be made aware that furthering equal employment opportunity is an integral part of his/her position and that their performance with respect to the Affirmative Action Program will be considered in performance appraisals and evaluation. It shall be the policy of the plan that any employee of the City of Riverside who wilfully violates the intent of this program shall be subject to appropriate disciplinary action including reprimands, suspension or dismissal. Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 8.

[71] 2 CAL. ADMIN. CODE § 17522 (December 22, 1973).

[72] "Band certification" refers to the practice of certifying a certain number of

tion.[73] Each operates by broadening the number of certified applicants beyond the number certified under the rule of three. The rule of five simply increases the number of certified applicants from three to five. Band certification increases the spectrum even further than the rule of five by certifying a fixed number of applicants or by certifying all those who score above a certain mark on an employment test. Selective certification permits the hiring authority to certify minorities whenever and for whatever departments they are "under-utilized."[74]

The use of any of these certification procedures may discriminate against nonminorities in the hiring process. Band certification and the rule of five, which are racially neutral on their face, are not as susceptible to a finding of discrimination as is selective certification. Either procedure, however, may be administered or applied in a discriminatory manner that classifies job applicants by race.[75] Band certification and the rule of five certify a larger number of job applicants than the rule of three. This increases the chances that minorities will be within the group of certified job applicants. Indeed, a personnel director or hiring authority may decide to use band certification or the rule of five specifically to hire more minority job applicants. This may be especially likely where the personnel director or hiring authority is under pressure to hire minorities to meet an affirmative action goal or timetable. If these selection procedures

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applicants (*e.g.* the top 35 scorers) or all applicants with a certain test score (*e.g.* all applicants with a test score of 80 or above). Band certification, in most instances, will certify more applicants then either the rule of three or the rule of five.

[73] *See, e.g.*, Sacramento Civil Service Rule 11.12 (August 3, 1971), which states, in part:

> [S]elective certification may be initiated by the Personnel Officer to increase employment of women and minority personnel at all levels. For the purposes of this regulation, minority personnel shall include blacks, Orientals, other non-Whites and Spanish-speaking/surname eligibles. Such selective certification may be initiated when the Personnel Officer determines that minority personnel are, in proportion to the total minority population of the City of Sacramento, underrepresented either within City employment as a whole or in an occupational area of employment.

[74] "Under-utilized" is defined in Berkeley's affirmative action plan as "having fewer minorities and women in a particular department, job classification or salary category than would be reasonably expected by their availability and representation in the Berkeley population." City of Berkeley Affirmative Action Program (City Council Resolution No. 45,257-N.S. revised to December 17, 1974), at 4-5.

[75] A city could argue, however, that both the rule of five and band certification operate like the rule of three, and are immune from constitutional challenge. Both procedures are racially neutral and both select only "qualified" individuals for employment. But, just as an affirmative action measure that operates through the rule of three may be challenged(*see* note 69 *supra*), the rule of five and band certification may be vulnerable if there is any chance that qualified minorities with lower test scores would be selected over qualified nonminorities with higher test scores.

are administered either under the pressure of affirmative action goals and timetables or for the specific purpose of hiring more minorities, however, a reverse discrimination challenge may be likely. A nonminority plaintiff may seek to have the procedures declared invalid as they are administered. He would merely have to prove that he would have been hired but for his race, and where a city uses the rule of five or band certification specifically for the purpose of increasing minority certification, this burden may not be too difficult to satisfy.

Selective certification, on the other hand, is not racially neutral on its face and is probably the most vulnerable element of many affirmative action plans. Some forms of this procedure are purely discretionary with the personnel director,[76] while other types of selective certification have a more mandatory character.[77] Whether the procedure is discretionary or mandatory, however, selective certification may be subject to an equal protection claim. On its face, selective certification calls for the certification of applicants on the basis of their minority status rather than their ranking on the civil service list. Selective certification thus effects a racial classification that benefits the minority at the expense of nonminorities in obtaining a job. Indeed, the mere use of the procedure manifests the type of discriminatory purpose that a nonminority plaintiff may seize

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[76] *See, e.g.*, Sacramento Civil Service Rule 11.12, note 73 *supra*.

[77] For example, some cities use methods which insure that a certain percentage of minorities are granted an interview. The City of Davis has a "stratified random selection" procedure which assures that a proportional number of ethnic minorities and women are granted an interview, where the total number of screened and eligible applicants is far in excess of the number of persons who can be interviewed in one day. City of Davis Affirmative Action Program (City Council Resolution No. 1395, Series 1973, December 17, 1973), at 6. All applicants meeting minimum requirements are considered qualified applicants and the applicant pool is analyzed to determine ethnic and sex percentages. The ratios existing in the applicant pool are maintained in the groups of applicants invited to interview. Each qualified applicant has his/her name written on a lottery ticket. All tickets for each ethnic or sex category are placed in a bowl, thoroughly mixed, and the number of tickets allotted to that category are drawn. This process is used for each category until the total number of persons that can be interviewed in one day are drawn. Complaint filed by William L. Owen, City Attorney for the City of Davis against the Davis Peace Officers Association for a Declaratory Judgment in the United States District Court, Eastern District of California, Civ. S-77-116, February 24, 1977, Exhibit B.

Berkeley's affirmative action plan gives "hiring priority" to categories of applicants that are "under-utilized" in city employment. After applicants have taken a written test and oral interview, all qualified applicants are arranged on an appointment register in order of set hiring priorities, with the highest priority group appearing first on the list. Non-priority group applicants are considered only after a waiver from the city manager has been obtained for all priority groups on the appointment register. Appointments are to be made on this priority basis until departmental and city-wide affirmative action goals are reached and maintained. In Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. 7047, (Alameda County, Cal., Super. Ct. 1975), the court invalidated this certification procedure, finding that it resulted in only minorities being granted an interview, since all priority applicants were considered before nonminority applicants.

upon to prove a case of reverse discrimination. Where a nonminority plaintiff can prove that he was denied a job because a city used selective certification, the procedure will be declared invalid.

Whether a city operates under the strong incentives of specific percentage goals and yearly timetables, sometimes enforced by sanctions, or adopts specific means of increasing the number of certified minorities, great potential exists for discrimination in favor of minorities in the hiring process. This potential may exist, as the *Bakke* case itself indicates, because of the way various selection procedures are administered, despite their facial neutrality. Whether a city's affirmative action hiring measures are discriminatory on their face or as they are administered, however, they will be subject to invalidation if a prima facie case of reverse discrimination can be made out against them in a particular factual situation.

Selection procedures such as band certification, the rule of five, and particularly selective certification are probably the most constitutionally vulnerable elements of an affirmative action plan. Cities may cease using them for this reason. The use of any of these selection procedures to implement highly specific affirmative action goals and timetables may make them even more constitutionally vulnerable, and a city will also either cease adhering to these goals or make them more flexible. The use of sanctions to enforce goals and timetables, moreover, is likely to be dispensed with altogether. The elements that are perhaps the most effective means of implementing affirmative action plans thus either may fall into disuse or be invalidated if challenged by nonminorities.

The barrier-reducing and recruitment aspects of many affirmative action plans also may be subject to challenge on their face or in the way they are administered, although it may be more difficult to prove that either of these measures impose any identifiable detriment on nonminority individuals. Discrimination against nonminorities is difficult to show where a city uses measures that are designed merely to increase the number of minority job applicants. Reducing barriers, moreover, is a racially neutral process, often designed merely to make job qualifications relate to job performance. Such a step reduces barriers to the employment of all individuals. It does not necessarily reduce barriers just for minorities. The need to recruit minorities for public employment likewise will endure. Pressure from the government and from the community to include more minorities in public employment will continue to have some influence on hiring decisions. Thus, as long as efforts to reduce barriers or to recruit minorities into public employment do not impose a detriment on nonminorities, both are likely to remain viable elements of affirmative action plans. Indeed, the barrier-reducing and recruitment aspects of affirmative action plans are the types of measures the *Bakke* court suggested were less restrictive alternatives to the special

admissions program.[78]

III. CONCLUSION

No equal protection issue in recent years has been more vexing, more fraught with emotional and political tension, and more difficult to resolve than the constitutionality of affirmative action. Minorities see affirmative action programs as long overdue measures to correct the effects of past prejudice. They are deeply concerned that the recent success of reverse discrimination suits threatens to take away what they believe is a long-denied opportunity to obtain their rightful place in society. Nonminorities, on the other hand, see affirmative action as a costly paternalistic effort on the part of an overly-intrusive government. They seriously question the merit of a policy that not only denies them any share of the benefits but imposes upon them the burden of paying the costs of past injustices, perpetrated not by them, but by their predecessors.

The *Bakke* decision represents a major expression of policy in this controversial area of the law and its practical impact is likely to have far reaching significance.[79] If the United States Supreme Court adopts the view that the Constitution is indeed color-blind, not only will school admissions be affected, but public employers are increasingly likely to encounter reverse discrimination suits as well. Since equal protection decisions may now have precedential value in what would otherwise be a Title VII setting, the dilemma public employers confront will become even more perplexing. Public employers can continue to implement affirmative action programs in response to the incentives of state and federal equal employment opportunity policies, or they can ignore these incentives altogether for fear of being charged with reverse discrimination. Local governments are likely to respond with an avowal of support for affirmative action goals but a failure to implement effective means to achieve them.

The prospective impact of *Bakke* on specific elements of affirmative action plans in effect in California cities illustrates such a response. Selection procedures, when used directly to increase minority representation in the work force, are likely to fall into disuse or be invalidated in reverse discrimination suits. Measures to reduce barriers and to recruit minorities into public employment, however,

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[78] Bakke v. Regents, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976).

[79] Indeed, the majority opinion in Bakke condemned the special admissions procedure in broad strokes:

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality. *Id.* at 62-63, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

are much less direct means of achieving affirmative action goals, and they are likely to survive, at least as long as they do not impose a detriment on nonminorities.

Applying a high level of constitutional scrutiny to affirmative action in public employment thus will have important consequences. Cities will be forced to reconcile affirmative action goals with reverse discrimination pressures to avoid burdening nonminorities. Such reconciliation may lead to hiring policies that give fewer advantages to minority individuals. At the same time, however, this could well result in perpetuating the advantages and opportunities of the white majority. How public employers will reconcile affirmative action goals with reverse discrimination pressures is uncertain. It is, however, a problem that public employers will inevitably face.

Barbara Detrich Linn
George Martin Reyes

ATTORNEY GENERAL'S COMMISSION ON RACIAL, ETHNIC, RELIGIOUS, AND MINORITY VIOLENCE

John Van de Kamp
Attorney General

1515 K Street
Suite 371
Sacramento, CA
95814

November 19, 1984

THE CHAIRMAN AND THE MEMBERS OF THE
ATTORNEY GENERAL'S COMMISSION ON
RACIAL, ETHNIC, RELIGIOUS, AND MINORITY
VIOLENCE

Dear Commission Member:

At our last meeting on September 10th the subcommittees developed recommendations to submit to the Attorney General. However, since many of you were absent during the presentation of the Litigation Subcommittee, I am sending a written summary of my report to you so that we may take a vote on it at our meeting on December 13, 1984.

Thank you for your attention.

Sincerely,

/s/ DH.

JUDGE ALICE LYTLE
Chairperson
Litigation Subcommittee

AL:dah

Enclosure

* Not sent to Avila Harvier Saito

LITIGATION >SUBCOMMITTEE

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

COMMISSION ON RACIAL, ETHNIC, RELIGIOUS
AND MINORITY VIOLENCE

Monsignor William J. Barry, Chairman

1515 K STREET, SUITE 511
SACRAMENTO 95814
(916) 445-9555
Marty Mercado
Coordinator

late ? Oct.

Mr. Joaquin Avila
President and General Counsel
MALDEF
28 Geary Street
San Francisco, CA 94108

Dear Joaquin:

Enclosed please find my summary of the subcommittee discussion at the RERMV meeting on September 10th. As you know, the enclosed report was made by me at the reconvening of the full Commission. However, since the majority of the Commission membership was absent during my presentation, the decision was made to submit the report in writing to the members at the next meeting. Before that is done, however, I would like to give the subcommittee members the opportunity to see the report and advise me as to whether it reflects their understanding of what was decided. To make it easy, I suggest I wait until October __, before sending the subcommittee report to the full Commission. If I don't hear from you by that time I will assume the report is acceptable to you.

Thanks for your attention.

Sincerely,

JUDGE ALICE LYTLE
Chairperson
Litigation Subcommittee

AL:bt
Enc.

This letter was sent to each member of the Litigation Subcommittee by Judge Lytle.

cc: MSGR BARRY
MARIAN JOHNSTON
MANNY MEDEIROS
MARTY MERCADO

Report on Subcommittee on Litigation

September 10, 1984

Purpose:

The subcommittee is to develop strategies to assist the Attorney General in exercising his enforcement authority under applicable statutes with particular emphasis in the Ralph Act.

Background:

At the first meeting of the RERMV Commission, the suggestion was made that the Attorney General explore the possibility of bringing a civil action under the Ralph Act. The Act provides that all citizens have the right to be free from violence, or intimidation by threat of violence because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute. Civil Code §51.7.

Subdivision (b) of the Act provides that whoever denies the right or aids, incites, or conspires in the denial of the 51.7 right is liable for actual damages and an additional $10,000 in punitive damages.

Subdivision (c) of the Act allows the Attorney General, the District Attorney, or the City Attorney to bring a civil action based on section 51.7 if there is reasonable cause to believe that persons are engaged in a pattern or practice of resistance to the full enjoyment of the rights embodied in the Act.

The first meeting of the subcommittee was confined to a discussion of possible strategies under the Ralph Act with subsequent meetings to be devoted to Attorney General general enforcement powers. The subcommittee first identified criteria the Attorney General could use in selecting cases for Ralph Act enforcement. Two considerations were paramount in identifying the criteria. They were the need to 1) utilize limited Attorney General resources in a manner designed to produce the most successful result; 2) avoid a perception on the part of local officials that the Attorney General is unilaterally interfering in essentially local matters.

Criteria:

The criteria identified by the subcommittee are the following:

(1) Multi-jurisdictional Acts constituting a pattern and practice that crosses county lines;

(2) Complexity of issues - Local officials may lack the resources to handle a factually or legally complicated matter.

(3) High degree of controversy - Serious political or other constraints may impair the ability of local officials to handle a particular set of circumstances;

(4) Egregiousness of the acts forming the basis of the suit. This criterion is further subdivided as follows:

a) great property or personal injury;
b) numerous victims;
c) series of acts of long duration;
d) serious threats of future violence.

(5) Case is of general "public interest" - This may include acts of violence against school children or acts of violence occurring in areas experiencing violence, in the recent past, e.g., Watts.

(6) Perpetrator of violence is a group as opposed to individuals.

As you can see, there is some degree of overlap in these criteria, but they are sufficiently distinguishable from one another to serve as convenient guidelines.

Recommendations:

The subcommittee felt that certain administrative and political steps should be taken by the Attorney General to ensure that the office is properly prepared to handle a new type of case. The recommendations are:

(1) An administrative procedure should be created within the Attorney General's office to provide for referral of matters coming to the office involving possible Ralph Act violations to the Civil Rights Division.

(2) At the same time these matters should be referred to BOICC for possible inclusion into its statistical network. There should also be developed a "feedback" mechanism from ~~BOICC~~ to the Civil Rights Division whenever the ~~BOICC~~ notes circumstances indicating a pattern and practice of violence. Sources for "pattern and practice" information could be 1) complaints coming into the Attorney General's office, 2) DFEH and FEPC files, 3) newspapers and TV news, 4) local law enforcement files; etc.;

(3) Screening procedures for the selection of Ralph Act cases should be developed for use at the initial intake stage and at the Civil Rights Division level;

(4) Intake personnel in Attorney General's office should be trained in the use of appropriate criteria for use in screening cases;

(5) Referral policy should be utilized at level of Civil Rights Division of cases that are unsuitable for Attorney General's Ralph Act enforcement but have potential for Ralph Act or regular P. C. enforcement at the local level;

(6) The Attorney General should set up training in Ralph Act enforcement for local District Attorneys, City Attorneys and law enforcement using P.O.S.T. and other mechanisms. In this regard, the Attorney General should explore the possible use of the California Specialized Training Institute (CSTI) as an additional training vehicle for local law enforcement. Attached is a brochure detailing the CSTI program and curriculum.

(7) The Attorney General should take steps to heighten the sensitivity of local law enforcement to the importance of attaching more priority to Ralph Act type cases. One method of beginning this process would be through distribution of a letter expressing the Attorney General's new enforcement policy in this regard attached to a press release announcing the policy.

(8) The Attorney General should solicit the assistance of District Attorneys and City Attorneys early in the development of Ralph Act enforcement policy.

(9) The Attorney General should explore the feasibility of directly prosecuting under selected penal code provisions cases of racial violence unsuited for the Ralph Act or other civil enforcement. At later meetings of the subcommittee criteria will be refined for use in these types of enforcement actions.

(10) The Attorney General should explore possibility of Ralph Act enforcement against local law enforcement in appropriate cases. Such cases would, of necessity, require a showing of a "pattern and practice" within a police or sheriff agency. Moreover, given the importance of honest, unbiased police enforcement to the safety and well-being of the community such an action would certainly be within the public interest.

(11) The Attorney General should explore intervention into Ralph Act cases brought by District Attorneys, City Attorneys or private individuals. The subcommittee will work on criteria for these cases. The letters mentioned earlier should include notification of this aspect of the Attorney General's enforcement policy.

It should be noted that one recommendation coming out of the subcommittee meeting dealt with an issue within the purview of the Legislative subcommittee. With apologies for "turf invasion" the Litigation Subcommittee submits the following recommendation. The Attorney General should be given express statutory authority to train police, District Attorneys and City Attorneys in the area of racial, ethnic, religious and minority violence.

Office of the Attorney General

January 24, 1986

Alice Lytle,

Attached is a copy of the Litigation subcommittee report. Since the subcommittee reports will be added as appendices to the final report to the AG - please make any changes you feel necessary so that we can reproduce as soon as possible.

Marty Mercado
Chief, Office of Community and Consumer Affairs
(916) 324-7859

ATTORNEY GENERAL'S COMMISSION ON RACIAL ETHNIC, RELIGIOUS
AND MINORITY VIOLENCE
REPORT OF LITIGATION SUBCOMMITTEE MEETING

Purpose:

The subcommittee is to develop strategies to assist the Attorney General in excercising his enforcement authority under applicable statutes with particular emphasis in the Ralph Act.

Background:

At the first meeting of the RERMV Commission, the suggestion was made that the Attorney General explore the possibility of bringing a civil action under the Ralph Act. The Act provides that all citizens have the right to be free from violence, or intimidation by threat of violence because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute. Civil Code Section 51.7.

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The first meeting of the subcommittee was confined to a discussion of possible strategies under the Ralph Act with subsequent meetings to be devoted to Attorney General general enforcement powers. The subcommittee first identified criteria the Attorney General could use in selecting cases for Ralph Act enforcement. Two considerations were paramount in identifying the criteria. They were the need to 1) utilize limited Attorney General resources in a manner designed to produce the most successful result; 2) avoid a perception on the part of local officials that the Attorney General is unilaterally interfering in essentially local matters.

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Signed: _____

Alice Lytle
Chairperson
Litigation Subcommittee